UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
NEW YORK BRANCH OFFICE
DIVISION OF JUDGES

INDEPENDENCE RESIDENCES, INC.

and **Case No. 29-CA-25657**
29-CA-25697
UNION OF NEEDLETRADES INDUSTRIAL **29-CA-25720**
AND TEXTILE EMPLOYEES (UNITE) AFL-CIO **29-CA-25839**

***Joanna Piepgrass, Esq.,* for the General Counsel.**
Frederick D. Braid, Esq. and Colleen A, Sorrell, Esq.
***(Holland & Knight, LLP)* New York, New York for the Respondent.**
***Brent Garren, Esq.,* New York, NY for the Charging Party.**

DECISION

Statement of the Case

STEVEN FISH, Administrative Law Judge: Pursuant to charges filed by Union of Needletrades Industrial & Textile Employees (UNITE), AFL-CIO herein called Unite the Union, or Charging Party, on September 30, 2003 [1], the Director for Region 29 issued an Order, Consolidated Complaint, Report on Objection and Notice of Hearing in Case Nos. 29-CA-25657, 29-CA-25697, 29-CA-25720, and 29-RC-10030, alleging that Independence Residences Inc., herein called Respondent or IRI violated Sections 8(a)(1) and (3) of the Act.

Pursuant to further charges filed by UNITE in Case No. 29-CA-25839, the Director, on November 18, issued an Order Further Consolidating Cases, Amendment to the Consolidated Complaint and Notice of Hearing, adding some additional alleged violations of Section 8(a)(1) and (3) of the Act.

The hearing with respect to allegations raised in said complaint was held before me over a period of nine days between November 18 and December 12. At the close of hearing, I severed Case No. 29-RC-10030 from the unfair labor practice cases, and set separate briefing schedules for the respective cases. After receipt of briefs in the representation case, I issued a recommended decision on Objections on June 7, 2004, where in I recommended that IRI's objections be dismissed and that the appropriate certification be issued. That case is currently pending before the Board.

Briefs have been filed in the unfair labor practice cases, and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I issue the following:

[1] All dates referred to are in 2003, unless otherwise indicated.

Findings of Fact

I. Jurisdiction and Labor Organization

Respondent is a domestic corporation, with its principal office and place of business located at 93-22 Jamaica Avenue, Woodhaven, New York, and 11 residential facilities located throughout Kings and Queens Counties in New York City, where it has been engaged in training, housing and related activities for developmentally disabled adults.

During the past twelve months, which period is representative of its operations in general, Respondent, in the course and conduct of its business operations derived gross revenues in excess of $250,000 and purchased and received at its New York State facilities, supplies and materials valued in excess of $10,000 directly from points located outside the State of New York.

Respondent admits and I so find that it is and has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and has been a healthcare institution within the meaning of Section 2(14) of the Act.

It is also admitted and I so find that UNITE is a labor organization within the meaning of Section 2(5) of the Act.

Facts

A. Case No 29-RC-10030

As noted above, on June 7, 2004 I issued a decision in Case No. 29-RC-10030, recommending that IRI's Objections be overruled and a certification of representatives be issued. The petition in that case was filed on April 24, 2003. The election which was conducted by mail ballot between June 2 and 16, shows 68 votes for UNITE, 32 no votes, 5 void ballots and 7 challenges, which were not sufficient to affect the results.

The Objections filed by IRI dealt primarily with the affect of Section 211(a) of the New York Labor Law, which allegedly required IRI to be "neutral" during the election campaign. I concluded in the Representation case that notwithstanding the alleged "neutrality" requirements of the Labor Law, IRI engaged in an aggressive anti-union campaign, and that IRI had not established how its campaign would have differed, but for Section 211(a), or that employees had been deprived of hearing IRI's views on unionization.

As also noted above, the Representation case is currently pending before the Board.

B. The Union's Campaign

The Union began its campaign to organize Respondent's employees at the beginning of April. Between April 1 and April 14, the Union formed an organizing committee and began to solicit authorization cards from employees. The earliest card was signed on April 9, and the Union gave members of the organizing committee cards to distribute to Respondent's or employees between April 9 and April 14. A number of signed cards were submitted to the UNITE from the members of the committee.

As I related in my prior decision, the Union sent an untitled and undated document to Respondent's employees "at the beginning of its campaign" according to its organizer Allison Duwe. She gave no further testimony as to precisely when the document was distributed. It

announces to Respondent's employees that an organizing committee has been formed to "learn how to form a union."

The document states that a majority of employees at IRI have signed authorization cards indicating support for Union, and that "our next step is to file with the National Labor Relations Board for a union election ."

Based on these statements, I conclude that the document was distributed shortly before the Union filed its petition of April 23. The document lists 12 employees as members of the organizing committee, including Mary Lynch. The document was not sent to Respondent but only to Respondent's employees.

According to Raymond De Natale, Respondent's Executive Director, he received notice of the Petition filed by the Union on April 24. However, he conceded that he had between a few days and seven days before that date, been informed by other representative of Respondent, that employees had been complaining about the fact that they had been visited at their homes by UNITE representatives. [2]

C. The Wage Increases

On April 23, Respondent issued a memorandum from De Natale to its employees entitled "Salary Adjustments and Merit Increases." The memo reads as follows:

> As some of you know, January 25, 2002 marked the beginning of correcting our salary structure at IRI. On that date, we corrected existing salary inequities, and set out to implement Annual merit increase to start on 10/01/02.
>
> Since then we have been working tirelessly to overcome certification issues, hiring additional staff, and establishing a solid financial structure for IRI. On 4/15/03 the Board of Directors authorized the payment of merit raises for our staff that will be both competitive and rewarding for our positive, accomplished and caring professionals.
>
> As promised these increases will be retroactive to 10/01/02 and are now being processed. Staff members who were employed prior to 10/01/02, who are full-time or part-time staff working at least 20 hours per week, are eligible for merit increases. Raises will be based on recently submitted evaluations.
>
> The Board and I wish to thank you for your past quality efforts in supporting the consumers and improving the operations at IRI.
>
> We look forward to successfully continuing to work together towards the common good of our consumers.

[2] Duwe testified that the Union conducted a "blitz", between April 16 and 22, wherein it made numerous home visits to Respondent's employees.

On May 2, Respondent granted an across the board increase to employees of fifteen cents an hour to each employee, plus a merit increase, which varied as to amounts for each employee. The merit component of the increase was retroactive to October 1, 2002. However, the retroactive portion of the increase was not actually received by employees until their next paycheck, two weeks later.

Along with the pay checks distributed to Respondent's employees a memo from De Natale to employees was included explaining the increases, dated May 21, 2003. It reads as follows:

> As promised, we are pleased to provide you with your merit increases starting with this pay check. Our Human Resources, Payroll, Finance, and MIS departments are working around the clock to implement these merit increases retroactively to 10/1/2002 in the next paycheck.
>
> In addition to your Merit increases, we were able to provide our Direct Care Staff with a base rate increase effective with this pay check (dated 5/2/2003), in order to stay competitive, maintain, and attract quality staff.
>
> Your current paychecks reflects the above increases as applicable.
>
> Should you have an questions, please contact our Human Resource department as soon as possible.
>
> Thank you for all your efforts, and help.

On May 9, 2003 Respondent issued a memo signed by De Natale entitled "Union Activity." The memo states that in Respondent's view "UNITE's presence at IRI IS NOT in the best interest of our employees and customers." In the course of this memo, Respondent discussed wages and compensation as follows:

> With regard to additional wages and compensation, we do agree that these are very important issues. However, as you are all aware, we have provided steady employment, competitive wages, and good benefits to each of our employees without the involvement of the Union. Indeed, between January 2002 and today, we have twice provided raises to the staff. Recognizing our need to be competitive with our industry we again increased the rate of pay for our Direct Care Staff and will raise all Direct Care professional rates of pay across the board in addition to merit increases.

De Natale testified extensively with respect to Respondent's decision to grant the wage increases in May of 2003. According to De Natale, the increases were previously promised to the employees in January of 2002, and were scheduled to be effectuated in October of 2002. De Natale testified in this regard that shortly after he assumed the position of Executive Director in May of 2001. he concluded that there were serious morale problems due to underpaid and poorly managed staff. There were also debt problems and regulatory deficiencies that he needed to correct. He addressed these issues at Board of Directors meetings as well as at

meetings with Residential Directors and Program Managers.

De Natale testified that he decided that Respondent needed to correct inequities in salaries, make salaries more competitive and institute a system of regular evaluations and merit increases. He announced his intention to implement such increases to Respondent's employees, supervisors, and to families of consumers during the latter half of 2001.

According to De Natale, his intention was to institute a system of salary increases, having three components. The components were an equity component (making up for past inequities in salary), a base increase (to meet industry averages), and a merit component. Thus after evaluating Respondent's salary structure and market rates given by competitors, Respondent gave wage increases in January of 2002 to over two thirds of its staff. The increases consisted of adjustments to correct previous inequities, and a merit increase given to 33 employees. While Respondent did not yet have a formal evaluation system in place, it gave merit increases based upon recommendations from Managers and Coordinators. They were instructed to identify up to three employees in their program who were exemplary and deserving of a merit increase. [3]

On January 23, 2002 De Natale issued a memo to the staff announcing the raises to employees, to be effective January 25, 2002. A further memo was issued by Challita explaining the details of the raises, dated January 25, 2002, the date that the raises were given. These memos are set forth below:

> I said in the house meeting, I would correct the issue of staff who were hired before 2001 and who earned less than staff more recently hired. Effective January this year there will be an adjustment in their January 25, 2002 paycheck to correct the situation.
>
> In addition, there are some positions in IRI that are significantly below the industry average for New York City, as well as instances where some staff are being paid at a rate lower than the rates of staff in the same position with the same qualifications and experience. These individuals will see an adjustment to their salaries in this same pay period.
>
> Finally, as I also said at these meetings, salary increases will be based on merit. Even though we did not have an evaluation tool in place with supervisors instructed in how to administer it by January, I did not want to totally abandon the concept of merit. Instead, I instructed the managers and coordinators to identify up to three staff from each program that, in both the managers and coordinators eyes, stood out as an exemplary employee. These people will receive a merit increase. Remember I said up to three staff. If both the coordinator and manager identified three staff, then so be it. If, however, they

[3] The record reveals that on January 4, 2002, De Natale detailed his intention to make salary adjustments for staff and to implement a merit increase system, in a memo with respect to the Agenda for the January 8, 2002 Board Meeting. The minutes of the January 8 meeting reflect that the Board reviewed and discussed De Natale's memo regarding salary adjustments.

agreed on one or two staff, then so be it. If however, they agreed on one or two staff, then it is those staff that will receive a merit increase.

While IRI was not in the position to evaluate our staff, we were able to adjust well over ⅔ of our staff through the steps noted above. We also committed to a yearly evaluation and salary review based on merit. Since our fiscal year begins on July 1st, and to ensure we have the State funds to support such raises, this process will take place each year to be effective October 1st. In the case of those staff who did not receive a raise this January, they will have the opportunity for a merit increase in October.

It is important that all supervisory staff explain to their staff what was described above. Each staff person is valued by IRI, and if we were able to, we'd provide a raise this January to each person who deserved it. This time salary adjustments were corrections as described above, with only a handful of exemplary employees receiving a merit adjustment.

In October any staff person regardless of their hourly rate will have the opportunity to receive a merit adjustment. Finally, we have made many changes to the salary structure this next pay period. A description of how each person's salary was adjusted will accompany the paychecks. Please review this sheet. If you have questions, discuss the issue with your supervisor or our Human Resources Department.

To: Direct Care Residential Rehabilitation and Medical Workers
From: Paul Challita
Re: Salary Adjustments

In accordance with the memo from Ray De Natale, Executive Director, the following is an explanation of the salary increases as of 01/06/02, which appear in your 01/25/02 paycheck.

The increase represents adjusting your old salary (IF IT WAS LESS THAN $9.00) to $9/00 per hour if you were hired in 2001, to $9.10 per hour if you were hired in 2000, or to $9.20 per hour if you were hired in 1999 or earlier.

If you are in the role of a Medical Care Worker, your salary was increased to $9.50.

In addition, if you received a merit increase ($500), this represents an additional twenty-four cents (.24) per hour based on 40 hours per week.

These adjustments are merely an attempt to rectify the inequities inherited in our previous salary system, and allow us to move forward with a more cohesive staff providing the best

supports to our consumers.

As can be seen in De Natale's memo, Respondent promised employees yearly evaluation review, with wage increases to be received effective October 1, 2002, and in October every subsequent year.

However, Respondent did not follow through on its plans to grant increases on October 1, 2002. According to De Natale, a number of reasons contributed to this failure. They include the need to develop and implement the evaluation procedure, a high percentage of managerial turnover, which resulted in a delay in receipt of completed evaluations, [4] the search for locating and moving to new office space, the planning and timing of Respondent's Gala fund raising event in October, and OMRDD compliance problems in a number of residences. Due to these events, October came and went without Respondent having granted the promised increases. In December of 2002, De Natale testified that Respondent realized that the October date had passed, and concluded that the wage increase would be postponed. No date was set at that time for the implementation, other then to do it as soon as possible.

De Natale testified further that he and Challita discussed the issue of eligibility for merit increases. They decided the eligibility date should be moved from April 1, 2002 to October 1, 2002, in order to make more employees eligible for the increases.

De Natale also testified that Respondent began to press its supervisors to submit their evaluations of employees to management. As of December of 2002, 42 evaluations of employees had been completed. The record further reveals that three evaluations were completed on 3/19/03, and that 40 evaluations were dated during the months of April and May of 2003. Thirty one of these evaluations were dated during the month of April. Of these thirty evaluations, 10 were completed between April 1, 2003 and April 4, 2003, three were completed between April 8 and April 9, two between April 15 and April 17, and 17 between April 20 and April 30. [5]

Finally these evaluations were signed on May 1 or 2, and five were not completed until between May 13 and May 28.

The evaluations that were submitted into the record consists of a chart with categories from unsatisfactory to outstanding, and with various numbers filled in by supervisors next to each employees name in each category. The evaluation then reveals a total score and an average for each employee. Based upon this "average" score, De Natale testified that senior management, primarily CFO Challita developed a scale to determine the merit component of the increase. According to De Natale, the calculations and decisions as to the precise amounts

---

[4] In this regard, from January 2002 through October of 2002, Respondent experienced a turnover of over 50% of its managerial staff.

[5] The record also reflects four undated evaluations from employees at Respondent's Gutman house. Three evaluations submitted by the manager there were dated April 25, and April 30. Similarly an undated evaluation for one employee at Judita was submitted.

Other evaluations from that house were dated from April 23 to May 2. One evaluation from an employee at Woodside was undated. Four other evaluations from that house were dated from April 23 to May 2. It appears from an examination of the records that the evaluations were submitted by the managers during the same time periods. I therefore conclude that the undated evaluations were completed during the same periods when other evaluations at the particular house were submitted.

were made "somewhere toward the end of April". In that regard he testified there was no memo issued that describes the correlation between the employees score and the amounts to be received, but asserted that "I'm sure there are notes between the fiscal officer that indicates that." No such notes were produced by Respondent.

With respect to the across the board increase of 15 cents per hour, De Natale testified that he "suspected" that this decision was made sometime in March. However, he conceded that there is no memo reflecting that decision in March. De Natale states that Respondent received surveys of salaries paid by sister agencies in February and March came up with a figure of 15 cents an hour for all employees to make its salaries "competitive". [6]

De Natale was also asked about the third alleged component of the May 2003 increase, wage inequities. He responded that Respondent looked at seniority, educational and certification factors. De Natale further asserted that a decision was made to evaluate these criteria and decide on equity adjustments in late 2002 or early 2003, but he was not aware of any memo reflecting that decision.

De Natale testified further that in January and February of 2003, he and Challita discussed the subject of wage increases, and concluded that since there was a "Trend increase" of 3.69% which had been known since late 2002, Respondent would present to the Board of Directors a revised budget, which would also permit a wage increase to employees. De Natale contends that he and Challita developed the revised budget which was to be presented to the Board at its March 11 meeting. De Natale asserts that he instructed Challita to present a revised budget at a meeting of the Finance Committee, as well as obtain approval for wage increases, based in part on this "Trend" increase. According to De Natale, Challita attended the March 11, 2003 Finance Committee Meeting, and reported to De Natale that he had presented a revised budget to the committee, which was approved at that time, and was to be approved by the Board at the next Board meeting. The Agenda for March 11 Finance Committee meeting was introduced, and one of the items mentioned is "revised budget for the 3.69 % revenue increase." No mention is made in the Agenda about a discussion of wage increases. The minutes of the March 11 Board meeting was also introduced into the record. It makes no mention of any discussion of wage increases or salary adjustments. It also does not refer to any specific discussion of or approval of a revised budget at that meeting. However, under the category "Fiscal Report," the minutes do refer to attached finance committee Agenda March 11, 2003.

De Natale further testified that prior to the April 9, 2003 Finance Committee meeting he and Challita discussed the issue of increases and, decided to seek approval to grant such increases from the Board, in view of the 3.69% increase in the trend factor. According to De Natale, Challita received approval from the Finance Committee to give the increases, and that the Board of Directors itself approved at its April 15 meeting. [7]

De Natale asserts that at the Board meeting of April, the Board approved the process of granting wage increases, due in part to the trend increase. According to De Natale the Board approved the raises which was not to exceed 4 to 5% of Respondent's budget and that the increases would be granted as soon as possible.

---

[6] Respondent did not introduce into the record any of these "surveys" that Respondent consulted in 2003, when it decided upon the 15 cents per hour increase.

[7] I note that De Natale was not present at the Finance Committee meeting. Challita did not testify.

Respondent introduced the Agenda for the Finance Committee meeting of April 9. It did reflect items to be discussed included "revised Budget for 3.69% revenue and Increase," and "October 1, 2002 salary increase." Notably no minutes of the April 9 Finance Committee was introduced, although De Natale testified that there should have been minutes of said meeting.

Minutes were provided for the April 15, 2003 Board of Directors meeting. The minutes reflect that based on the Finance Committee meeting of April 9, a motion was passed to adopt the revised budget to include a 3.69% increase for the year ending June 30, 2003. The Motion passed was attached to the minutes, and reflects that the Budget for July 1, 2002, June 30, 2003 is approved and revised to include a 3.69% increase for the year ending June 30, 2003. Neither the Board minutes, nor the Motion make any mention of a discussion of wage increases, although the motion does state that all the items on the attached agenda were discussed, and as noted above, the Agenda does include a reference to "October 1, 2002 Salary Increase."

De Natale was asked when the actual decision was made to give the raises on May 2. De Natale responded that after the Board approved the raises at the April 15 meeting, Respondent intended to grant the increases as soon as possible, as instructed by the Board. De Natale further testified that he and Challita discussed when to give out the raises, and concluded that because of Respondent's payroll system, May 2 was the next payroll day. De Natale was unclear as to when that decision was made, but believes that it was sometime in late April. De Natale also asserts that the decision was made before he became "officially" aware of the Union on April 24. However, De Natale, concluded that he was "unofficially" aware of the Union around seven days earlier. He added that he and Challita discussed whether or not Respondent should give the increase now that the Union is here, and that they after consulting with their attorney decided to give the raise on May 2.

De Natale also testified that in the first quarter of 2003, Respondent looked at what sister agencies were paying and calculated the base increase based on market rates. He conceded that Respondent made no such calculation of market rates in October of 2002, although Respondent had allegedly intended to do so and make a base raise as a component of the October 2002 increase. De Natale added that Respondent did not make the base raise retroactive to October 2002, since the base component was calculated based upon average agency salaries paid in 2003. He also stated that Respondent had not considered giving this base portion of the increase separately in October of 2002. Furthermore, although Respondent's managers were subject to the evaluation procedure and did receive raises in May of 2003 as a result, the managers did not receive a base increase, as did the bargaining unit employees in 2003.

D. The Alleged Coercive Interrogations

In or about in Late April, at Respondent's Mary Ann Stack residence, Harold Burchett, Respondent's Program Manager and an admitted supervisor, approached employees Patricia Martis and Frederick Craig. The employees were in the residence living room, and no consumers were present. Burchett directing his remarks to both employees, asked "did anybody from the Union speak to you or did you speak to them?" Neither employee responded. The conversation ended.

On or about May 1, Burchett conducted a staff meeting at the same residence. There were about ten employees present plus Assistant Manager, Noreen Grant. After discussing work related matters with the employees, Burchett asked "did anybody from the house speak to anybody from the Union, or did anybody from the Union come to your house?" None of the employees responded. Burchett then told the employees that he wanted to know because he

was going to attend a manager's meeting at the main office. [8] Paul Campbell was the program manager for Respondent's Judita residence.

Campbell had several conversations about the Union with employee Teisha Usher. During all of the conversations Campbell encouraged her to vote for the Union and informed her that she should vote for the Union because the Union will provide the employees with better job's and better benefits. During one of these conversations, in Campbell's office, he also asked Usher how she was going to vote? Usher replied that she was going to vote "Yes".

On another occasion, on May 27, Campbell called three employees including Usher into his office. After encouraging them to vote for the Union, Campbell asked them if they were going to vote for the Union? All three employees responded that they intended to vote for the Union.

Finally, on or about June 7, Ken Brodsky, Respondent's Associate executive Director for Program Operations and Quality Improvement visited the Park Lane facility. Four employees Lilly McGee, Sabrina Reeves, Michele Williamson and Jimmy Claridge were present in the dining area of the residence. Brodsky approached the employees and asked them if they had gotten their ballots and if they had voted? None of the four employees responded. Brodsky then asked "What is it that you want?" Reeves replied "More money." Brodsky then asked "How much more?" Reeves responded "Fourteen Dollars." Brodsky answered that he didn't know of any agency that paid fourteen dollars. McGee then interjected that there were a few agencies that did, and gave some names of such agencies. Brodsky concluded the conversation by commenting, "Well, you should be working for those agencies." [9]

E. The Alleged Solicitation of Grievances

The above conversation between Brodsky and the four employees is also alleged as an unlawful solicitation of grievances. In that regard, McGee testified that prior to the discussion that she described with Brodsky, she had seen Brodsky at the facility only once or twice before.

On or about June 13, Paul Challita and Heather Barker (Respondent's Director of Human Resources) visited the East 21st facility. Barker approached Mary Lynch in the living room, and asked her how everything was going with consumer A. F.? They had a discussion about Lynch's progress with A. F. and A. F.'s goals. Barker then suggested that Lynch, as well as several other employees who were present all go into the dining room. [10]

The employees congregated in the dining room and were joined by Challita. Barker informed the employees that she wanted to get together with the staff and find out if there are any problems and more specifically any problems about health benefits? She also asked what Respondent could do to improve the satisfaction of the staff.

Otero complained that Respondent's coverage for eyeglasses wasn't very good. Otero also complained about the out of pocket expenses that she was incurring. Barker replied that Respondent also offers an HMO plan wherein she wouldn't incur any out of pocket expenses if

[8] The above findings are based on the undenied and credible testimony of Martis. Burchett did not testify.

[9] The above incident is based on the credited and undenied testimony of McGee. Brodsky did not testify.

[10] The other employees present were Mindy Otero, Teona Bramwell, and Dion Lewis.

she stays in network.

Bramwell complained about the dental coverage for periodontal visits, and stated that it provided only one or two visits. Barker replied that seemed correct to her, but if Bramwell wanted Barker to look into anything, she should give Barker a call and Barker would check into the plan further.

Lewis told Barker that he needed a tax sheltered annuity form. Barker replied no problem, she will send him a form over the interoffice mail. [11] Challita concluded the discussion by telling the employees that Respondent would look into improving the health benefits, and that "we'll see what we can do about it". [12]

Lynch testified that this June 13 meeting was the first time that she had ever seen either Barker or Challita at the 21st facility. [13]

Barker, on the other hand, testified that she had visited the 21st facility between eight and ten times, prior to June 13, wherein she would speak to consumers or staff members, observe the physical plant, discuss with staff how they were working with the consumers, and to answer questions staff may have about benefits or other areas that Barker is responsible for.

In this regard, Hannah Nelson Respondent's Director of Residential Services, testified that since she has been employed by Respondent for 8 years in various capacities, it has been a regular practice for Respondent's Directors to make regular visits to Respondent's facilities, to answer any questions or concerns from employees, and to make sure that Respondent's policies and procedures are adhered to.

F. The Alleged Threat of Loss of Benefits

In my prior decision in Case No. 29-RC-10030, I made findings concerning the statements made by various officials of Respondent at meetings held on May 28. The relevant portion of these findings as it relates to this allegation dealt with statements made about "Focus Groups" by Barker. I repeat these findings below.

Employee Michael Russell asked a question about health coverage. Heather Barker responded that IRI had a program of "Focus Groups" where employees would meet with members of management to discuss health insurance issues, where employees would be informed of IRI's benefits, and would make suggestions to IRI as to what improvements they would like in their coverage. Barker added that if the union won the election, these focus groups would end. [14]

---

[11] The form relates to Respondent's existing 403(B) benefit plan.

[12] The above description of the events of June 13, is based on a compilation of the credited portions of the testimony of Lynch and Barker. As noted Challita did not testify. Notably while Barker testified that she did not tell the employees that Respondent would change health benefits, she didn't deny Lynch's testimony, as detailed above that Challita told the employees that Respondent would look into improving health benefits and that "We'll see what we can do about it."

[13] Lynch began her employment at Respondent in April of 2002. She further testified that no supervisor had ever held a meeting and asked employees to discuss their problems.

[14] My findings with respect to the subject of focus groups is based on a compilation of the testimony of employees Tihesha Young Reddick, Michael L. Russell, Patricia Martis, and former

Continued

G. The Alleged Discrimination Against Mary Lynch

Mary Lynch was employed by Respondent beginning in April, 2002 at its E. 21st location as a direct care professional. She initially worked full time for 40 hours per week, on a shift of 4 p.m. to 12 midnight.

In August of 2002, Lynch obtained another job. On August 31, 2002, Lynch sent a letter to Claudius Campos indicating that she had accepted a full time job which requires her to work evenings, and requested a change to a per diem employee, available Friday and Sunday evenings and Sunday during the day.

Campos and Hanna Nelson, Respondent's Director of Residential Services discussed Ms. Lynch's status, and tried to find a way to retain her as an employee, since she was a good worker and had close relationship with consumer A. F. In fact, Aderemi Ogundiran, a psychologist employed by Respondent had spoken to Assistant Manager Felicia Saunders and told her that he was concerned about A. F.'s well being if Lynch were to be out of his life because of the relationship that she had built up with him.

After some discussion between Campos and Nelson, Respondent offered Lynch a change in her hours to 6 to 10 in the morning, in order to accommodate her schedule. Lynch rejected this offer. Respondent then offered Lynch a position every Friday evening from 4:00 p.m. to 12 midnight. Lynch accepted this offer.

According to Nelson she and Campos discussed the necessity of keeping Lynch on to work with A. F., and decided to offer her a position, as a relief on call worker on Friday nights, for a "transition" period of time until A. F. becomes comfortable with other staff. Nelson asserts that she instructed Campos to inform Lynch of this arrangement, and that he told her that he did so and Lynch agreed to it. However, Lynch testified that she spoke to Nelson personally about the change to Friday and that Nelson offered her the position on Friday nights on a regular basis from 4 to 12. Nelson told Lynch that it would be a regular shift, and according to Lynch no mention was made of a "transition" period for this schedule.

I credit Lynch with respect to this issue, particularly since Campos did not testify and it is appropriate to draw on adverse inference against Respondent for its failure to call him as a witness. *International Automated Machines,* 285 NLRB 1122 (1987). I find therefore that when Lynch was offered the option to change her hours to Friday's from 4 to 12, she was told that it was a regular shift, and was not informed that the change was to be temporary or that it was to last only until a "transition" period had been completed.

Lynch continued working regularly on this basis until June of 2002. She did not have to call in to see if there was work for her on these days. Lynch had been the "primary" caregiver for A. F. and one other consumer. A "primary" caregiver is the employee who is regularly assigned full time to a particular consumer.

---

supervisor Paul Campbell. Barker when called as a witness by General Counsel, did not deny making the statements attributed to her by employees concerning focus groups. She merely stated that she did not recall whether the subject of focus groups came up or whether she said anything about focus groups at the meeting. When called as a witness by Respondent, she denied saying that IRI would eliminate focus groups if the Union were elected. I do not credit her denials, and credit the mutually corroborative testimony of the employees as related above.

When UNITE began to organize in April, Lynch became one of the leading supporters of the Union. She signed a card for UNITE and placed a stack of cards including her own signed card on the staff and management desk at her residence. She also put a stack of union fliers onto the staff log book in the presence of other staff members on three or four occasions. One of these flyers that Lynch distributed consisted of pro-union comments plus pictures of four employees including Lynch and signatures of some 47 employees, also including Lynch's signature. De Natale admitted that he was aware that Lynch was a union supporter, and that he had seen union flyers with names of employees appearing on them.

Additionally, as noted above, De Natale conducted two captive audience meetings on May 28, to present Respondent's views on unionization. During this meeting, De Natale made various anti-union remarks including his assertion that he did not think it would be in the best interests of the employees for the Union to come in. He also warned employees that the cost of a Union would take up to 100% of Respondent's budget and Respondent couldn't afford it, that if the Union came in there would be no more open door policy, and that employees could wind up with less money or be in a worse situation after the Union was voted in.

At one point during the meeting, De Natale stated that employees would have to pay $500 initiation fee to the Union and would have to pay dues. Lynch then left the meeting and asked Duwe who was outside the facility about De Natale's assertion. She told Lynch that there would be no initiation fee and that dues would go into effect only after the Union had a contract. Lynch then returned to the meeting and contradicted De Natale's claim. She said that she had spoken to the Union and that there was no initiation fee for employees.

Lynch also responded to De Natale's assertion that employees could wind up with less money or be in a worse situation if the Union came in. Lynch stated that she had never heard of a case where a union comes in and makes conditions worse for employees. De Natale replied that it was "chancy," it might work and it might not work.

At another point during the meeting, Lynch spoke up and said that employees were not making enough money at Respondent and could not live on $9.00 an hour. One of the House Managers responded to Lynch that with only a high school education, which most of the people had, they could not expect to make more than $9.00 per hour. Lynch replied that regardless of educational level, no one could live on $9.00 per hour.

Although other employees also spoke at the meeting in favor of the Union, Lynch was the most vocal. She was the only employee from her facility to speak on behalf of the Union. Lynch made several comments that De Natale should promise employees that he would listen to them and promise them better wages or more frequent meetings. De Natale replied that "I can't make any promises due to the 2(11) law." Lynch also used the work "bullshit" on more than one occasion referring to statements made by De Natale. [15]

At one point in the meeting, De Natale after Lynch made some complaints about employees not having a voice and not being listened to, told her to sit down.

Lynch also attended the afternoon meeting conducted by De Natale, and made similar comments about the money situation and again contradicted De Natale when he said that there would be a $500 initiation fee. After Lynch replied that she had spoken to the Union and was told that there would be no initiation fee, De Natale said that Lynch could not be certain of that

[15] This finding is based on the testimony of Barker.

because the Union needed money. At the afternoon meeting, Lynch was the only employee who spoke out in favor of the Union.

As also related above, Lynch was spoken to on June 13 by Challita and Barker along with several other employees at the 21st facility. After being asked by Barker what Respondent could do to improve the satisfaction of the staff, employees mentioned issues such as vision and dental benefits. Challita replied that Respondent would look into the health benefits.

As related above the election was conducted by mail between June 2 and June 16. The tally of ballots dated June 17, showed that a majority of ballots had been cast for the Union.

On or about June 19, after the election, Lynch received a phone message from Saunders informing her that she wasn't needed anymore on Friday nights and instructing her to contact Saunders. Lynch called several times thereafter and left messages for Saunders, but Saunders didn't return her calls. Lynch received a call from employees Teona Bramwell who told Lynch that Saunders had instructed her to tell Lynch not to come in on Friday anymore and that Respondent had hired someone else to work on Friday, Saturday and Sunday.

Lynch did not report to work on that Friday, as instructed. Three or four weeks later, Lynch was called by Bramwell and asked to work on a Friday in July. She worked that Friday, and on two other Fridays thereafter. She was not called to work on Saturdays or Sundays.

At some point, undisclosed in the record, Lynch began to work full time at her other job, so she could not work on Fridays any longer. She did leave a message with Campos stating her availability to work weekends, but did not receive any calls.

When Lynch worked on the Friday evening 4 to 12 shift from September 2002 to June of 2003, there were three other employees working with her on that shift, Bramwell, Otero and Lewis. [16] When someone was not in, generally an employee from another shift would fill in and work for the absent employee. On Saturdays and Sundays, the house was staffed with employees who worked only on the weekends.

When Lynch worked on the 2 or 3 Fridays after mid June, the same three employees were working that shift. Thus, although Lynch was told that a new employee was hired to work Friday, Saturday and Sunday, she never saw any such employee or heard about such an employee from her fellow employees or the consumers. Lynch never spoke to Saunders after her change in status, as Saunders was on leave.

Nelson testified on behalf of Respondent concerning the decision to change Lynch's status in mid June. According to Nelson, the Friday shift was specially created for Lynch, and was only supposed to last for a "transition" period, so that A .F.'s departure from Lynch's care could be gradual. The shift created for Lynch was an extra position, above the normal staff of three employees.

Nelson testifies that someone was hired to replace Lynch when she gave up her full time position, and at some unspecified point, A. F. was assigned a new primary caregiver. However, Lynch was still in A. F.'s life on Fridays, and because of her relationship with him, it was Respondent's intent to continue Lynch in his life for a transition period. According to Nelson she

[16] These three employees were full time employees, working 40 hours per week, Monday through Friday.

first asked Campos about how the transition was going with A. F. in December of 2002, and reminded him that the arrangement is not forever, and that he needs to inform Nelson when he feels A. F. is okay. Nelson states that Campos to told her at that time that A. F. is "not ready yet". Nelson testified further that she asked Campos again at least one other time between December and May about the transition of A. F. Nelson testified that Campos replied that he hadn't heard about any problems with A. F., but he would check with the psychologist and the staff about how things were going.

Nelson asserts further that sometime in late May or early June, after reviewing the schedules, she asked Campos again how the transition was going and how is A. F. doing? Campos allegedly told Nelson that A. F. is doing well, and that Lynch is not so much a topic of discussion by A. F. as before, and that the psychologist and assistant manager felt comfortable that the extra day on Fridays was no longer necessary. Nelson testified that she informed Campos to stop the shift now and inform Lynch of the decision.

Nelson further testified that no one was hired to replace Lynch on the Friday shift, and that Respondent continued to staff the facility with three employees for that 4-12 Friday shift, as it had done before the special arrangement was made for Lynch.

Ogundiran testified that in May or June, he noticed that A. F. was adjusting well to some of the other staff members who were taking care of him, when Lynch was not present. He further testified that in a discussion with Saunders and Helena Benton, the nurse at that time, he informed them that it was his opinion that A. F. had adjusted to the new people, and if Lynch is out of A . F. 's life there would be no negative impact. He further testified that Saunders agreed with this assessment and stated that she was glad that more people were able to take care of A. F. According to Ogundiran, there was no specific discussion of changing Lynch's schedule or her shift. As noted above, neither Campos nor Saunders testified in this proceeding.

None of the above described conversations or decisions were documented by Respondent.

H. The Termination of Trecia Usher

Trecia Usher was employed by Respondent starting in November of 2002, working at the Judita residence. Usher testified that she had several conversations with supervisor Paul Campbell about the Union. According to Usher, Campbell in all of the conversations, would encourage her to vote for the Union and give various reasons for his opinions.

As I have detailed above, during two of these conversations, one with Usher above and the other with two other employees present, Campbell asked how Usher and the other employees were going to vote? Usher and the other employees responded that they intended to vote for the Union.

Usher also testified to another alleged conversation with Campbell. According to Usher, Campbell called employees Jane Daniels and Laura Clark, in addition to herself into his office. Usher asserts that Campbell informed the employees that he had informed management at a meeting of managers that everyone on his staff [17] was going to vote for the Union and that three employees Usher, Chris Scott and Laura Clark are the leaders.

[17] These were approximately 10 employees at the Judita facility under Campbell's supervision.

Clark testified that after a management meeting, Campbell informed her and Usher that he had told management that "everyone in my house is voting for the Union, and it's a done deal." He also allegedly informed the employees that he had also told management that Usher, Clark and Francis were union reps.

Campbell testified as a witness for General Counsel. The record also establishes that Campbell was terminated by Respondent because Respondent had found out that he was campaigning for the Union. While unfair labor practice charges were filed by the Union with respect to this discharge, the Region declined to issue complaint as to these allegations.

Campbell testified that he attended several management meetings during which the Union organizing drive was discussed, primarily by De Natale. Campbell asserts that De Natale asked managers to identify which employees at their residences were union supporters and at those meetings a census was taken wherein supervisors would inform management whether each of their employees were intending to vote "Yes" or "No." According to Campbell, at one meeting the census revealed a vote of 36 "For" the Union and 24 "Against." At another point in his testimony Campbell stated the vote was 24 "Yes" and 13 "No.'" Campbell was adamant that each and every supervisor had been able to ascertain the Union sentiments of all of the employees under their supervision and communicated these facts to management . Campbell also testified that he informed management about some ringleaders for the Union in his house. At one point in his testimony he stated that he told management that the ringleaders were Reggie Campbell, Laura Clark, Treisha Usher and Frances Pierre. Later on his testimony, he claimed that h e told management that the ringleaders were Clark and Elvis Scott. Campbell further testified that De Natale instructed managers to create a paper trial for pro-union employees so that they could be terminated if Respondent was unable to convince them to vote "No." In this regard, Campbell asserts that he in fact wrote up several pro-union employees and recommended their terminations. However, according to Campbell, these termination recommendations were not followed and the employees were not terminated.

De Natale denied having asked any manager to identify pro-union supporters, denied that any lists of employees Union sentiments were provided or requested and denied instructing supervisors to prepare paper trails of employees to justify terminations of employees. Nelson corroborated De Natale's testimony in this regard.

Supervisor Todd Gallishaw also testified about management meetings conducted by De Natale. He denied that any census was taken of employees' union sentiments at these meetings, and denied that De Natale had ever instructed supervisors to find out which employees were pro-union so that Respondent could fire them. However, Gallishaw admitted that during at least two management meetings De Natale asked the managers about the Union sentiments of their employees at their particular residences. According to Gallishaw he replied "I couldn't tell you. My staff doesn't speak to me." Gallishaw admits however that some managers did respond to De Natale's questions, and would furnish information as to the number of employees in favor of or against the Union at their residence. Gallishaw further testified that no specific names of employees were mentioned by supervisors at any of these meetings.

De Natale did testify that he did ask supervisors at the meetings generally about how things were going at their houses, vis-à-vis, the election, and that some supervisors would respond that there was support for the Union at their houses, and others would say that they have no idea. De Natale also conceded that Paul Campbell replied that at his residence there were a lot of people in favor of the Union. However, De Natale specifically denied that Campbell mentioned any specific names of employees who were pro-union supporters, or identified anyone as ringleaders in the Union drive. He denied knowing whether Usher was a

Union supporter.

On June 30, Nelson received a phone call that an anonymous call had been received reporting that Usher had abused consumer L. W. on June 28. At that time Respondent conducted an investigation of the incident, as prescribed by OMRDD rules. During the period of the investigation, Usher was suspended from working with consumers, but was paid for her time spent working in the office during the period of the investigation. On July 25, 2003 the investigator, Elle Weinstein issued a report, which was subsequently signed off on and approved by various other representatives of Respondent. The report found that the allegation of abuse was "disconfirmed." Usher was reinstated to her position as DCP at the Judita facility as of July 9, 2003. The report found the allegation unsubstantiated. An anonymous call allegedly from an employee of Judita has asserted that Usher had pushed consumer L. W. Although the investigation revealed that Usher had interacted with L. W. for part of the day, and that a black and blue mark was discovered after a body check of L. W., other evidence particularly a denial by L. W. that she had been pushed, resulted in the conclusion that the allegation was "disconfirmed."

On Sunday, August 8, Usher was working along with DCP Wykeem Martin on the 8:00 a.m. to 4:00 p.m. shift. Martin was cleaning the bathroom on the first floor, when she heard consumer E. G. scream in the living room "she sprayed me in my eyes," and stepped into the hall. E. G. ran to Martin, showing her eyes and said "She sprayed me in my eyes." Martin saw Usher standing at the end of the hallway in the living room about twelve to fifteen feet away. Usher was standing with a yellow can of furniture polish in one hand and a paper towel in the other, staring at Martin in silence. Martin did not say anything to Usher and Usher did not say anything to Martin. Martin did not take any steps to wash E. G. 's eyes, and did not see any redness or irritation in E. G. 's eyes. Martin also did not see any moisture or spray from polish on E. G. 's face. Martin then took E. G. into her bedroom to calm her down, and asked E. G. if Usher had sprayed her in her eyes. E. G. answered "Yes." Martin explained that E. G. would have to make an official report of the incident since there was nothing that she, Martin could do since she did not see the spraying. Martin told E. G. that if she reports the matter to Walden, Martin would tell exactly what happened. E. G. replied that she didn't think they would believe her.

The next day, August 4, Martin attended a staff training program. At the class, she was informed that even if an employee does not see abuse, if they hear consumers yelling, screaming or anything abnormal, that the employee must report it. Martin then reported what she had seen to her manager Carline Chalvire who instructed Martin to report it to Walden. Martin immediately reported the incident to Walden, who instructed her to put her complaints in writing and file a form reporting the incident, dated August 4, 2003. Martin filled out the form, plus a written statement, essentially stating what she had observed as outlined above.

Usher was removed from her shift on August 4, and suspended while the investigation was conducted. On this occasion she was not paid for the period of time spent while the investigation was being completed and was not assigned to work in the office, as she had been during the July investigation of abuse.

The investigation was assigned to Campos. His investigation consisted of interviewing Usher, Martin, E.G. and Chalvire. Usher in her statement denied that she was spraying or cleaning anything that day, and denies hearing E.G. scream or complain about anyone spraying something in her eyes. The report issued by Campos on August 7 reflects Martin's version of events, as outlined above, as well as that E.G. confirmed that she was sprayed in the face by Usher, and that she put her hand up in front of her face to block the spray from going into her

eyes. It also reflects that E.G. suggested that Usher was probably joking with her when she sprayed her in the face, and that E.G. was concerned that management will not believe her if she told them about the incident and that she might get in trouble for reporting such incidents.

The report concluded that although no one witnessed Usher spraying E.G. in the face, E.G. reported the incident at the time it allegedly occurred and is considered a reliable reporter with no history of making false allegations. Therefore, Campos concluded that E.G. 's history is consistent with the findings of this investigation that the allegation of physical abuse filed on behalf of E.G. is substantiated.

The report further recommends administrative action be taken against Usher, retraining of Martin and the staff on reporting procedures and counseling of E.G. on reporting incidents without fear of retaliation.

Based on this report, Usher was informed by Walden on that date that she was terminated on August 8 for abuse of a consumer.

The record is unclear as to precisely who and when the decision was made to terminate Usher. The agencies incident review committee met on August 21, and confirmed and approved the decision, but it is not certain who or when such decision was made. Nelson Barker and De Natale all testified that they at some point reviewed Campos's report, but did not make the actual decision. Nelson testified that she was informed by Walden and Brodsky when she returned from vacation, that Usher had been terminated for abuse that had been substantiated. As noted Campos did not testify. Neither did Walden or Brodsky, but the record does reflect that Walden is no longer employed by Respondent.

Testimony was offered by De Natale, Nelson and Barker to the effect that where allegations of abuse are confirmed after an investigation, termination generally follows, absent justifiable or exculpatory circumstances. Indeed De Natale testified that OMRDD has notified Respondent that "except in rare circumstances," they want to see terminations in cases of confirmed abuse. Further Campbell, who as noted appeared as a witness for General Counsel, testified that "nine out of ten times, if you abuse one of the clients, you're going to be terminated."

Heather Barker testified that since she became H.R. Director, approximately 10 employees were terminated after abuse of consumers were found. She could not recall any details of these terminations. She did recall one incident of where an employee was found to have committed abuse, and was not terminated. That was employee Willie Harden, had failed to give medication to a consumer as required. While this is considered abuse, he was not terminated, but merely retrained and lost his certification to administer medication.

Nelson, testified similarly to Barker that at least 10 employees, but probably more employees of Respondent were terminated for confirmed abuse, since she began her employment with Respondent in 1990. She did recall specific examples such as Godwin Nadji, a program manager, who was terminated for "lifting up" a consumer to force the consumer to shower. Nelson also recalled an incident at the ICF residences, where the employee stepped on the feet of a consumer who was having behavioral problems, to stop the consumer from jumping up and down. This was considered abuse, and the employee was terminated. Another incident recounted by Nelson involved a program Manager, Modji Daria, who had been pushed by a consumer, and who in turn pushed the consumer back and slapped the consumer as well. Further, Nelson recalled that Steven Fritz, an employee at the Gutman residence was working with difficult and behaviorally challenged consumers. Fritz failed for three days to give the

consumer medication that had been prescribed by the doctor. He was terminated for this conduct. Nelson also recalled an employee named Nadine Ellis who was terminated for striking a consumer who had struck the employee first. Ellis was terminated for this conduct, although she had been struck first by the consumer. According to Nelson it doesn't matter if the consumer hits first, the employees are trained how to handle this kind of behavior, and are not permitted to strike back.

De Natale testified to two instances of "rare circumstances", where abuse was confirmed but termination was not effectuated. One was the incident described above. where a medication was not administered to a consumer as required. In that case the direct care employee was not terminated, but according to De Natale the manager was terminated because he told the employee to do something else, rather than log in the medication.

Additionally, De Natale recalled the incident where the program manager, as testified to by Nelson was fired for "inappropriately" moving an employee into the shower. He corroborated Nelson's testimony concerning the manger but added that an employees who assisted the manager at the manager's direction in moving the employee, was not terminated, since she was following the orders of the manager.

I. The Alleged Discrimination Against Rhonda Gulley and Tihesha Young-Reddick

Tihesha Young-Reddick and Rhonda Gulley were DCP's at Respondent's Metro II residence located on the first floor. They were responsible for caring for four high functioning consumers, including consumer S.W. who is independent enough so that she can be left alone without supervision. Metro II is a separately certified residence, but is located at the same facility, but on a different floor, separated by stairs outside the apartments. Four other consumers live in Metro II, and are supervised by DCP's Sharon Blount and Lance Brutus.

Young-Reddick signed a card for the Union at her house in mid April. At that time Union representatives gave her cards to distribute to employees. She gave out cards to all employees at Metro I and Metro II. All employees signed cards except for Blount and Brutus. Blount ripped up the card that Young-Reddick gave to her.

Young-Reddick attended the May 28 meeting conducted by De Natale. The subject of employees of Respondent being "at will" was brought up. Young-Reddick spoke up and asked for a definition of "at will" employee. No one from Respondent replied to her inquiry. She asked the same question two more times, and again neither De Natale nor any other official of Respondent answered her inquiry. Finally, another employee, Michael Russell finally told her what "at will" meant.

Gulley signed a card for UNITE at her home sometime in May. She was also given cards to distribute to fellow employees. She also gave out cards to employees either at the facility or outside of the residence. She also distributed Union flyers at Respondent's 101 residence, a different facility from where she worked.

Gulley and Young-Reddick both testified that in late May, they were in supervisor Todd Gallishaw's office, which also contains the copying machine and the time clocks. Gallishaw was sitting at his desk, four or five feet away from the copying machine, and time clock where Gulley and Younger-Reddick were talking. The employees were talking about the Union and the election. Younger-Reddick asked Gulley how was she going to vote. Gulley replied that she was going to vote for the Union. Young-Reddick said that she was going to vote for the Union too. According to Young-Reddick, Gallishaw turned around in his chair and said, "You all don't

need a Union. Look at me. I don't need no Union." Gallishaw then left and slammed the door behind the two employees.

Gallishaw denied that he ever overheard a conversation between Gulley and Young-Reddick, where they were talking about supporting the Union, and that he had no knowledge whether Gulley and Young-Reddick were Union supporters. He further testified that the only employee in the facility whom he heard discussing the Union was Blount. According to Gallishaw would tell him that she didn't want any part of the Union, and that the Union was messing with her money. Gallishaw claims that made no response when Blount made these comments to her.

Respondent maintains at each residence daily logs of consumer's behavior, goals and progress. This information is contained in three ring binders known as Resident Habitation Books or "Res Hab Books." Each consumer has a separate "Res Hab" book, which is updated by DCP's as to how the consumers are meeting their goals.

Sometime in late June, Gallishaw approached Young-Reddick and Gulley. He said to the employees "I need you all to do me a favor." Young-Reddick asked what he needed done. Gallishaw replied that he needed them to update the "Res Hab" books, because the State is coming in for an audit. Young-Reddick replied that "This is management's job." Gallishaw answered that he was depending on them and also "Could you do it?" The employees agreed and updated the books for all eight consumers at both Metro I and Metro II. The updating consisted of removing the old data from the binders, place it in a file box, and put new information in the new data sheets. Young-Reddick and Gulley performed this work in a little over 35 minutes, with Young-Reddick who worked faster, helping out Gulley with the books she was assigned to update, after Young-Reddick completed the work on the books assigned to her.

Respondent's employees traditionally eat their meals along with the consumers that they supervise on a "family style" basis. The record is undisputed that this practice has been encouraged by Respondent, although employees are not required to do so.

Both Gulley and Young-Reddick assert that Gallishaw instructed them to stop eating with consumers any longer. Their testimony in this regard is unclear, inconsistent, and is not credited. Young-Reddick claims that Gallishaw told this to her and Gulley in late May at the time that Gallishaw put up a list on the refrigerator requiring employees to put their name on a list before taking food from the refrigerator. This action by Gallishaw was taken due to complaints from employees, including Young-Reddick that food was being stolen from the refrigerator. However, later in her testimony Young-Reddick conceded that this list was put up by Gallishaw on June 24, and that the list said nothing about the not eating with consumers any longer, but only mentioned signing the list, when food is removed from the refrigerator.

Gulley testified that Gallishaw called a meeting, a week after the election and informed all employees at both Metro I and Metro II that because of the problem of stealing food that he was investigating, employees must sign a list if they take food from the refrigerator, and that employees are no longer to eat with consumers. Gallishaw testified that he never told Gulley, Young-Reddick or anyone else not to eat with consumers, and that in fact eating with consumers has always been encouraged by Respondent. He adds that he put up the list requiring employees to sign a list if they took food from the refrigerator, because of complaints made by employees, and that in fact Young-Reddick suggested putting up such a list. He further adds that he notified employees at both Metro I and II at a meeting of this requirement.

I credit Gallishaw as to these issues. The testimony of Gulley and Young-Reddick concerning this matter was as noted confusing and inconsistent. [18] I therefore conclude that Gallishaw never instructed any employees that they could no longer eat with consumers any longer, but that he did inform all employees to sign if they took food from the refrigerator. I also find it likely that Gulley and Young-Reddick may have interpreted this instruction that they should no longer eat with consumers, although I find that Gallishaw had no such intention.

Gulley was hired by Respondent on November 5, 2002. Young-Reddick was hired on February 25, 2003. On June 24, 2003, Young-Reddick and Gulley left Metro I to get dinner. While the record is unclear as to precisely when they left the facility. [19] There is no dispute that before they left they brought their 4 consumers to Metro II, and asked the two employees at Metro II to watch their consumers, while they went to get something to eat. It is also undisputed that neither Young-Reddick nor Gulley made any attempt to get and did not receive permission from Gallishaw or any other supervisor before they left the facility.

At about 7:45 to 7:50 p.m. Young-Reddick and Gulley returned to Metro I. They assert that they returned separately, but Gallishaw testified that they came in together. There is no dispute however, that when they arrived, Gallishaw had taken the consumers from Metro II back to Metro I, and that he instructed both Young-Reddick and Gulley to punch put and write a statement detailing what time they left and when they returned.

Young-Reddick's statement reflects that she left to get lunch at 7:25 p.m. and was gone for approximately 35 minutes. She added in the statement that she was hungry, and since she could not eat consumers food, she went to get something to eat. She added that she had asked Blount to watch her consumers, who were not alone. Gulley's statement reflects that she left at 6:30 p.m., the consumers were upstairs with Sharon, and that she returned at 7:00 p.m. and was told by Gallishaw to punch out. They were also told to report to the main office the next day at 9:00 a.m.

According to Gallishaw, he returned to the Metro I facility at about 6:00 p.m., and found consumer S.W. alone, [20] without any staff. Gallishaw asked S.W. where the rest of the consumers and staff were. S. W. replied "Upstairs at Metro II". He then went upstairs to Metro II, and saw the three Metro I consumers with the four Metro II consumers, being watched by Blount and Brutus. Gallishaw asked where Young-Reddick and Gulley were, and was told by Blount that they had gone to get something to eat. Gallishaw asked what time they left, and Blount replied "A few minutes ago." Gallishaw then took the Metro I consumers back downstairs, and conducted a walk through of the residence, and Gulley and Young-Reddick were not there.

Gallishaw at that point, attempted to contact various higher level supervisors. He finally reached Nelson at somewhere between 6:20 and 6:40 p.m. He informed Nelson that he had returned to the residence a little after 6:00 p.m. and that Gulley and Young-Reddick had left the

---

[18] Thus Gulley testified that Gallishaw told all employees at Metro I and II to no longer eat with consumers, while Young-Reddick asserted that this was told only to her and Gulley.

[19] In this regard, Young-Reddick testified that she left sometime after 7:00 p.m. and returned 35 minutes later. She also testified that she left before Gulley. Gulley testified that she and Young- Reddick left together at 6:30 p.m. and went their separate ways to eat. Gulley asserts that she returned to the facility from 30 – 60 minutes later.

[20] This by itself was not a problem, since S.W. was high functioning and allowed to be left alone.

facility to get something to eat. Nelson asked if Gallishaw had given them permission to leave the residence. Gallishaw replied "No." Nelson instructed Gallishaw that when Young-Reddick and Gulley return to the residence, to ask them to fill out statements indicating what time they left, and that they should punch out and meet at the main office, the next morning.

Gallishaw further asserts that Young-Reddick and Gulley returned to the residence at 7:50 p.m. He claims that when they walked in, Young-Reddick upon seeing Gallishaw, ran out and went upstairs to Metro II. He asked Gulley where they had gone. She replied that they went to "Get something to eat." He then asked what time she had left the residence. Gulley replied "At about 6:30 p.m." Gallishaw laughed and said that he has been there since 6:00 p.m. Gulley made no reply. He then told her to punch out and write a statement detailing where she went and what time she left and what time she returned.

For her part, Gulley recalls only that Gallishaw asked where she was and then told her to fill out a statement detailing when she left and when she returned. She also asserts that she asked if she was being terminated, and Gallishaw told her to report to the office the next day.

Gallishaw asserts further that he then went up to Metro II, and Young-Reddick was on the phone. Gallishaw asked her to come downstairs. She replied "I'm on the phone." A few minutes she came downstairs. Gallishaw asked Young-Reddick what time she had left. She answered "7:00 p.m." Gallishaw responded that he had been at the residence since 6:00 p.m. He told her to write a statement and to punch out. Young-Reddick responded loudly "this is bullshit", and that she was only gone a few minutes.

At some point on that day, Young-Reddick telephoned Nelson. Nelson testified that Young-Reddick told her that Gallishaw had instructed her to leave and write up a statement and asked if he can do that. Nelson asked Young-Reddick if she had gotten permission from Gallishaw. She replied "No." Nelson then asked if Young-Reddick was aware that she needed to get permission to leave, and if she can't reach the manager, she should call the coordinator. Young-Reddick replied, "Yes, but I was hungry." Nelson instructed her to punch out, write a statement, and report to the main office the next day. [21]

On June 25, at about 8:30 a.m. Gallishaw met with Nelson and Barker. Gallishaw, Barker and Nelson asked Gallishaw to restate the events of the day before. Gallishaw recounted that he had come to the residence at about 6:00 p.m., and both employees were not there. Then consumers were upstairs and Metro II employees told him that Young-Reddick and Gulley had gone to get something to eat. He added that the employees did not return until 7:50 p.m. He also said that the consumers were upstairs at Metro II, which was not a good idea, since the apartment is small, it was hot, and behaviors could have occurred. Barker asked if Gallishaw had given the employees permission to leave the residence. Gallishaw replied that he had not. Nelson interjected that she had been called by Young-Reddick, the night before, and that Young-Reddick confirmed to Nelson that she had left the residence without authorization.

Barker asked what punishment Gallishaw recommended. Gallishaw stated that he recommended termination, because he couldn't trust them with the consumers, the employees had not received permission to leave the residence, and they had lied to him about what time they had left. Both Nelson and Barker agreed with the recommendation to terminate both

[21] Young-Reddick did not testify concerning a conversation with Nelson on June 29, and did not deny the assertions made by Nelson.

employees. Barker then left the room, and after receiving approval from De Natale instructed Gallishaw to bring in the employees to notify them of the decision. Gulley was asked to come in first. According to Gulley, Nelson informed her it was best that she be separated from IRI, because she abandoned her post and the consumers were unsupervised. Gulley claims that she replied that the consumers were not unsupervised, but were upstairs with other staff members. Nelson replied that she could grieve [22] and the meeting ended.

According to Nelson and Gallishaw, Gulley was asked to recount the events of the day before. She stated that she had left the residence to get something to eat, and that she and Young-Reddick left together, but went to eat separately. She added that she left at 6:30 p.m. and returned not too long after. Nelson asked if she had gotten permission from her supervisor or manager. She replied "No", but she had told the staff upstairs that she was going to eat. Nelson claims that she asked if Gulley was aware of the policy with regards to leaving the site without authorization. Gulley replied "Yes." Nelson stated that IRI acknowledges that if employees are hungry they can go and get something to eat, but they must inform the supervisor and receive permission, because Respondent is concerned about coverage of consumers.

Nelson then informed Gulley that she was being terminated for leaving the residence without management approval and because she took her consumers upstairs, with the potential for possible harm from behavior problems. Gulley's only response was that she had notified the other employees to watch her consumers. Young-Reddick was called in next. She testified that Nelson and Barker told her that she had used "poor judgment" and was being terminated. She allegedly asked what she had done, and was told that she had mixed consumers that had target behaviors, and that she had not received permission from management before leaving the site. Young-Reddick contends that she replied that she didn't have Gallishaw's page number, because he had changed it. She also asserts that she told the supervisors that she did not know that she needed permission from supervisors to leave the premises and that other employees also have done this. According to Young-Reddick, Nelson also mentioned that there was a contradiction between her version of events and Gulley's, in that Gulley had stated that the employees went out together.

According to Gallishaw, Young-Reddick stated that she was sick that day and hadn't eaten and needed something to eat. She added that she was gone for only a few minutes. She also attempted to place the blame on Gulley by claiming that Gulley had jumped into her car. Nelson then informed Young-Reddick that she was being terminated for not receiving permission from her supervisor before leaving and because of the potential danger of leaving the consumers upstairs together.

With respect to the latter assertion, Respondent's witnesses assert that there is a problem with mixing the consumers at Metro I and Metro II, because some have target behaviors, and there is a potential for an outburst if they were together particularly in a small area. Further it was very hot on that day, with no air conditioners. Further these are staffing requirements by OMRDD, and Metro I and II are separate residences. Respondents witnesses concede, as testified to by Gulley and Young-Reddick that the consumers of Metro I and Metro II are at times together for various reasons, but they insist that supervisors must be aware of it and must give permission for this to occur.

[22] Apparently Respondent has an internal grievance procedure.

Gallishaw prepared identical memos, dated June 25, 2003, detailing his reasons for recommending discharge of Young-Reddick and Gulley, which also included a recitation of the facts of June 24, consistent with his testimony. The reasons given in the memo for his recommendation were that the employees left consumers upstairs without adequate supervision, with the potential for an incident to occur. The apartment was too small to accommodate all consumers of both apartments, and they failed to notify management prior to leaving the site and taking consumers to another apartment.

The Personnel Action Form prepared by Barker, on June 30,, and eventually approved by other management officials, stated that the employees was terminated because they "left the work site for over 2 hours without approval."

With respect to the issue of permission, both Young-Reddick and Gulley testify that they were unaware of any requirement or rule that employees need to seek permission from management before leaving the work site. They also testified that they were told by officials of management that they were entitled to one hour for lunch, but deny that any supervisor ever told them that they needed to obtain permission in order to leave the site on such an hour break.

Gulley testified initially that in the past she had taken her meal breaks, and had not asked for or received permission from supervisors to leave the premises. Upon further examination, however Gulley conceded that in the past when she would leave the site to get something to eat, she would tell the supervisor (usually a supervisor named Aquilla) and Aquilla would tell her its okay to leave. On one occasion, in April, Gulley and another employee left together, told Aquilla, and Aquilla watched the consumers.

Gulley admitted that she did not leave the site to go eat after Gallishaw became her supervisor, which was in fact shortly before June 24. Gulley also conceded that after Gallishaw became a supervisor, she asked Gallishaw for permission to go outside and take a cigarette break. Gallishaw replied that she did not have to ask permission to take a smoke break. She was asked why she asked Gallishaw for permission to take a cigarette break, if she was unaware of any requirement to obtain permission to leave the site. Gulley replied that "All managers are not the same, and she wanted to see what he was going to say." Further, conceded that while consumer S.W. can be left alone, she will always call a supervisor and let them know that S.W. is being left by herself.

Young-Reddick testified initially that she left on numerous occasions for lunch and never had to ask management for permission. When asked how often, she said "once or twice", since she usually ate with the consumers. She added further that although she was entitled to an hour for lunch, when she went out, she would go for a half hour and bring food back. Notably, her affidavit states that June 24 was the first time that she went out to lunch on her lunch break.

Young-Reddick testified further that in fact June 24 was the first time that she had ever left the site to go on a lunch break, but she did not ask for permission, because she had seen other employees leave the site without obtaining approval from management. She mentioned that on at least 5 or 6 occasions, Sharon Blount would leave the site, and ask Young-Reddick to watch her consumers. She would go out at 5:30 p.m. and be gone for 15-20 minutes. According to Young-Reddick when Aquilla was the supervisor, Blount would leave and tell Young-Reddick to watch her consumers, and Aquilla would be in her office or on the phone. Young-Reddick did not know if Aquilla heard Blount tell Young-Reddick that she was leaving, or whether Blount had received permission from Aquilla to leave the site. Young-Reddick did recall that there were some occasions, when Aquilla was not there when Blount left, and was present when Blount returned. On these days, according to Young-Reddick, Aquilla did not say

anything to Blount about the need to obtain permission before leaving the worksite.

After Gallishaw was promoted to supervisor, Young-Reddick testified that Blount would continue to leave the site, about once a week. However, she could not recall if Gallishaw was present either when Blount left or when she returned. She also conceded that normally Gallishaw was not at the worksite between 5:00 and 6:00 p. m., when Blount allegedly left the premises without obtaining permission.

Young-Reddick also testified that Gulley would frequently leave the residence, sometimes for an hour or an hour and a half, and would ask Young-Reddick to watch her consumers. However, Young-Reddick was not aware if Gallishaw knew about these incidents[23]

Testimony was elicited from several management officials including Nelson, Gallishaw and Barker that employees must obtain permission from supervisors before leaving the worksite to take a meal break. This testimony was also corroborated by several of General Counsel's own witnesses, including Laura Clark, Patricia Martis, Paul Campbell, and Mary Lynch. There are several portions of Respondent's Employee Handbook that deal with the issue of leaving the work site and obtaining permission.

On page 44 of the handbook there appears a section entitled "PERMISSION TO LEAVE DURING WORKING HOURS." It reads as follows:

> "IRI employees are not permitted to leave during their working hours. Leave must be arranged properly with the Residential Manager Director or Departmental Director before an employee can leave. Unexcused leave is cause for dismissal."

Both Young-Reddick and Gulley admitted that they were given a copy of the handbook and admitted that they had read it. However, the handbook also contains a section entitled "DISCIPLINARY ACTION." This section sets forth a progressive disciplinary procedure, involving verbal warnings, written warnings, suspension and termination. The section also states that in cases involving serious violations or misconduct, progressive disciplinary steps may be disregarded and more severe disciplinary action may be taken. The section does not define "serious" misconduct. However, in another part of this section entitled "Inappropriate Workplace Behavior", it lists numerous examples of behavior that is strictly prohibited, and that violations may result in disciplinary action up to and including discharge. The handbook then lists 26 types of behavior, including the following: "Unauthorized absence from post of duty during working time (working time does not include meal periods or break.)" [24] The last item on the list states, "any other reason deemed sufficient in IRI's sole discretion."

Finally another section of the handbook is entitled "NEGLECT OF DUTY." It sets forth a list of examples of actions that would be considered "neglect of duty" and are subject to Progressive Discipline. It goes on to list seven items, including "leaving an assigned work site without authorization."

Nelson testified that in May of 2001, employees Fayette Gomez and Jean Braham left

---

[23] I note that Gulley testified, as noted above that June 24 was the first time that she had left the worksite to go and get something to eat after Gallishaw became supervisor of the residence.

[24] In this regard, Gallishaw conceded that under Respondent's policy, meal periods are not part of working time.

the 101 residence together to go to 7 Eleven to get something to eat. She did not know how long the employees were gone, but it was more than 15 minutes.

The employees did not receive permission from any supervisors to leave the premises, and defended their conduct by stating that they had informed their co-worker that they were leaving. In that case, there were 12 consumers at the house, with three employees on the shift. Thus when these two employees left the residence, they left one employee in charge of 12 consumers. Both of these employees were terminated at that time for leaving without obtaining permission. Nelson did not recall whether either of these employees had any record of prior discipline when they were terminated in May of 2001.

Analysis and Credibility Resolutions

A. The Alleged Interrogations

In determining whether a supervisor's questions to an employee constitute an unlawful interrogation, the Board examines whether under all the circumstances the questioning tends to interfere with, restrain or coerce employees in the exercise of their Section 7 rights. *Rossmore House,* 269 NLRB 1176 (1984). They examine various factors in making this assessment, including whether the employee is an open union supporter, the employer's background, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of the reply. Although strict evaluation of each factor is not required, these useful indicia serve as a starting point for assessing the totality of the circumstances. *Heartshare Human Services of New York,* 339 NLRB # 102, Slip op. P.2 (2003).

Applying these principles to the facts herein, General Counsel contends that conduct of Burchett, Campbell and Brodsky amounts to coercive interrogation. As detailed above, Burchett the Program Manager at the Mary Ann Stack Residence, spoke to two employees in the residence living room, and a few days later conducted a staff meeting with 10 employees present. He asked the same question during both incidents. He inquired whether anybody from the Union spoke to the employees and did anyone from the Union come to their house. No employee responded at either incident. At the meeting, Burchett stated that he wanted to know because he was going to attend a managers meeting at the main office.

I find that Burchett's questioning of the employees was coercive based on the totality of the circumstances. Here there is no evidence that any of the employees questioned were open or active Union supporters. *La Gloria Oil and Gas Co.*, 337 NLRB 1120, 1123 (2002), *Sea Breeze Care Center,* 331 NLRB 1131, (2000), and none of the employees responded to Burchett's inquiries, which indicates that employees felt coerced, *La Gloria Oil, supra, Medicare Associates,* 330 NLRB 935, 941 (2000). Further, Burchett's statement to the employees that he needed the information because he was going to attend a manager's meeting at the main office, indicates to employees that he intended to ferret out and report on the Union learnings of the employees questioned. This is a strong indication that the questioning was coercive. *President Riverboat Casinos of Missouri* , 329 NLRB 77, 78 (1999).

Accordingly, based on the foregoing analysis and precedent, I conclude that Respondent, by the conduct of Burchett has coercively interrogated employees in violation of Section 8(a)(1) of the Act.

General Counsel also asserts that Respondent coercively interrogated employees by the conduct of Campbell. In that regard the evidence establishes that Campbell asked several employees, in his office, including Usher how they intended to vote in the election. All of the employees including Usher replied that they intended to vote "Yes." In each of these conversations, Campbell encouraged the employees to vote for the Union, and set forth some reasons for his opinions on that subject.

I conclude, contrary to General Counsel, and in agreement with Respondent, that based on a totality of all the circumstances, that the questioning was not coercive. Campbell was a low level supervisor, *Cardinal Home Products,* 338 NLRB # 154 Slip op p. 6 (2003), *John W. Hancock Inc.,* 337 NLRB 1223, 1225 (2002); Campbell's tone was not hostile or threatening during the conversations, *Heartshare Human Shares,* 339 NLRB # 102, Slip Op. p. 2 (2003); *John W. Hancock, supra*; and all of the employees questioned did not hesitate to answer truthfully, which is evidence that there was nothing in the questions that could reasonably have "inspired fear" on the employees. *Heartshare Human Services, supra; Cardinal Home Products, supra* at P 7.

Further, I note that during the questioning, Campbell encouraged the employees to vote for the Union. I conclude that in these circumstances particularity where Respondent's higher officials had expressed to employees its belief that they should not vote for the Union, that Campbell's expressed support for the Union, makes it less likely that employees would feel coerced by his inquiries about how they intended to vote.

Therefore, I recommend dismissal of the allegations of coercive interrogations based on Campbell's conduct.

Finally, General Counsel asserts and the complaint alleges that Respondent unlawfully interrogated employees by the conduct of Brodsky. In that regard, on June 7, Brodsky asked four employees in the dining room of the residence if they had gotten their ballots and if they had voted? No employee responded.

I conclude that this inquiry was not coercive. The parties were in the midst of a mail ballot election. Brodsky did not ask employees how they voted or if they supported the Union. He inquired only if they had received their ballots and if they had voted. This kind of an inquiry, in my judgment is not coercive, since it was likely to be perceived only as Respondent attempting to make sure that the mail ballots were received and that employees have an opportunity to express their views. His tone wasn't hostile or threatening, and was not accompanied by any other unlawful conducts. Although General Counsel does assert that Brodsky's further inquiry of the employees "What is it that you want?", constitutes an unlawful solicitation of grievances, as discussed below, I agree and find that Respondent did not violate the Act by such inquiry.

Therefore, I conclude that Respondent did not coercively interrogate employees by Brodsky's conduct on June 7, and I recommend dismissal of that allegation in the complaint.

C. The Alleged Solicitation of Grievances

It is well established that where an employer who has not previously had a practice of soliciting grievances or complaints, adopts such a course when unions engage its organizational campaigns seeking to represent employees, there is a compelling inference that is implicitly promising to correct, these inequities he discovers as a result of his inquires and likewise urging on his employees that the combined program of inquiry and correction will make union

representation unnecessary. *Embassy Suites Resort,* 309 NLRB 1313, 1316 (1992); *Reliance Electric,* 191 NLRB 44, 45 (1971). However, it is not the solicitation of grievances itself that is coercive, but the promise to correct grievances that is unlawful. The solicitation of grievances merely raises an inference that the employer is making such a promise, which inference is rebuttable by the employer. *Uarco Inc.,* 216 NLRB 1, 2 (1974); see also, *Curwood Inc.,* 339 No. 148 Slip op. p. 3 (2003).

General Counsel contends that the record establishes two instances of conduct violative of the Act based on above principles.

The incidents are the above described discussion by Brodsky with four employees at the Park Lane facility, and the conduct of Barker and Challita at the 21st facility with several employees, including Mary Lynch. Respondent argues initially that no violation can be found, since these discussions by management with employees were consistent with prior practice. *Wall-Mart Inc.,* 339 NLRB No. 153 Slip op. p. 2 (2003); *MacDonald Machinery,* 335 NLRB 319, 320 (2001); *Recycle America,* 308 NLRB 51, 57 (1992). I disagree.

As Respondent notes, the record does contain testimony that various officials of Respondent, including Barker, Challita and Brodsky have from time to time visited various residents to talk with employees. However the record discloses that these discussions related primarily to operational matters, or in Barker's case to questions about existing benefits. There is no evidence that any of these officials asked employees what they wanted or inquired about how employees believed existing benefits should be changed. Thus the conversations in question here, where Brodsky asked employees "what they wanted" and Barker asked what problems they had about health benefits and what Respondent could do to improve the satisfaction of the staff, are significantly different than Respondent's prior discussions with employee. *K-Mart Corp.,* 316 NLRB 1175, 1177 (1995), *House of Rafael,* 308 NLRB 568,569 (1992).

I therefore conclude that in both of these meetings with employees, Respondent's representatives solicited grievances from employees as described above. However, that is not the end of the inquiry however, as the issue is whether it has impliedly promised to correct such grievances, and or whether Respondent has rebutted the implied promise. *Uarco, supra.*

With respect to the discussions involving Barker and Challita, the evidence discloses that after Barker asked about employee problems and what Respondent could do to improve the satisfaction of the staff, employees complaining about their dissatisfaction with eyeglass coverage, and dental coverage, Barker discussed Respondent's existing coverage, but Challita stated that Respondent would look into improving health benefits and "we'll see what we can do about it." This response by Challita is more that sufficient to establish an implied promise to correct the problems that employees complained about, and there is no evidence to rebut this inference, *Heartland of Lansing Nursing Home,* 307 NLRB 152, 156 (1992); *Windsor Industries,* 265 NLRB 1009, 1016 (1982), *enf. denied on other grounds, Naomi Knitting Plant,* 328 NLRB 1279, 1281 (1999).

I find therefore that Respondent has violated Section 8(a)(1) of the Act by the above described conduct. However, with respect to the conversation between Brodsky and the employees, I find that Respondent has rebutted any inference of an implied promise. Thus in response to Brodsky's question as to what the employees wanted, an employee stated more money. Brodsky asked "How much?" and she answered "Fourteen dollars." Brodsky then informed the employees that he didn't know of any agencies that paid that amount. Another employee interjected that there were a few agencies that did, and Brodsky responded, "Well

you should be working for those agencies." Thus, I conclude that Brodsky expressly negated any inference of an implied promise to rectify employee grievances, by stating in effect that Respondent would not pay the fourteen dollars that employees had asked for, and that if employees wanted such salary they should work for those agencies that paid that amount. In such circumstances, Respondent has not violated the Act. *Mariposa Press,* 273 NLRB 528, 529 (1984); *Uarco, supra.*

I therefore recommend dismissal of this allegation in the complaint.

C. The Alleged Threat of Reprisal

During the course of the May 28 meeting conducted by De Natale, employee Michael Russell asked a question about health coverage. Heather Backer responded that Respondent had a program of "Focus Groups," where employees would meet with members of management to discuss health insurance issues, where they would be informed of Respondent's benefits and would make suggestions to Respondent as to what improvements they would like in their coverage. Barker added that if the Union won the election, these focus groups would end.

I conclude that Barker's statement constitutes a threat to withdraw an existing benefit from employees, if the Union won the election, and is therefore violative of Section 8(a)(1) of the Act. *Yuma Coca Cola Bottling Co.,* 339 NLRB No. 14 Slip op. 1-3 (2003); *Tim Foley Plumbing Service,* 332 NLRB 1432, 1438 (2000). [25]

D. The Wage Increase

The Board will infer that on announcement or grant of benefits during the critical period is coercive, but the employer may rebut the inference by establishing an explanation other then the pending election for the timing of the announcement or the bestowal of the benefit. *Mercy Hospital Southwest Hospital,* 338 NLRB No. 66 Slip op p. 1 (2002), *Star Inc.,* 337 NLRB 962 (2002).

Therefore, where as here the wage increases were granted shortly after the petition was filed, Respondent has the burden of establishing that both the timing of and the grant of the wage increases were not influenced by the appearance of the Union. *McAllister Towing & Transportation,* 341 NLRB No. 48 ALJD Slip op. p. 30 (2004); *Perdue Farms,* 323 NLRB 345, 352-353 (1997), *enf,* 144 F. 3rd 830, 836-37 (D.C. Cir. 1998).

Respondent attempts to meet its burden of proof in this regard primarily by the testimony of De Natale, that the wage increases granted were planned and decided upon prior to the appearance of the Union, and were merely an implementation of the wage increases promised to employees in January 2002, to have been granted in October of 2002. I find that the evidence submitted by Respondent falls short of meeting its establishing that it would have granted the increases that it gave in May of 2003, on that date, absent the appearance of the Union.

[25] The fact that several employees testified that they were unaware of the existence of focus groups is not significant. Respondent's witnesses concede that it had this existing program which would not necessarily be eliminated should the union win the election. While as a result of collective bargaining, this benefit may or may not continue, Respondent did not explain that focus groups could be lost as a result of negotiations.

Respondent did establish that in January of 2002 it granted wage increases to over two thirds of the staff, and that it promised its employees at that time a yearly evaluation review, with increases to be effective October 1, 2002. De Natale testified further that for various business reasons, particularly the failure of supervisors to submit timely evaluations, Respondent did not grant the increases as promised in October of 2002. De Natale further testified that he and CFO Challita had a number of discussions about the increased in early 2003, and decided to obtain approval from the Board of Directors for the increase, in part based on a 3.69% Trend Increase. De Natale further asserts that the Finance Committee of the Board approved a revised budget based on the Trend Increase and then on April 9, approved the increases, which were subsequently approved by the Board of Directors at a meeting of April 15, However, I find the testimony of De Natale unpersuasive, particularly in the absence of corroboration from Challita or any significant documentary evidence. I find the absence of Challita's testimony to be particularly disturbing, since he. according to De Natale attended the Finance Committee meetings, (while De Natale did not), allegedly discussed the wage increases with De Natale in early 2003, was involved in developing the scale determining the merit component of the increase, as well as the decision to grant a 15 cent per hour across the board increase, and the decision to give the increases on May, 2, allegedly due to "payroll" reasons. I find it appropriate to draw an adverse inference against Respondent for its failure to call Challita as a witness, to testify about these crucial issues, and conclude that his testimony would have been unfavorable to Respondent on these matters. *Spero Corp.,* 298 NLRB 439, 443 (1990); *International Automated Machine, supra.* Further, Respondent has failed to produce documentation establishing that the amount and timing of the increases were decided upon prior to the Union's appearance i.e. merit, *Perdue Farms, supra* at 353.

The minutes of the April 9 Finance Committee were not produced by Respondent. This is a crucial omission, since this is the meeting where according to De Natale, Challita informed him that the increases were approved. Moreover, although the Agenda for the meeting does reflect "October 1, 2002 salary increase", as one of the topics for discussion, no further elaboration was detailed. Even the April 15 minutes of the Board of Directors meeting makes no direct reference to wage increases, although it does refer to a discussion of items on the Agenda of the Finance Committee meeting which did mention as noted the October 2002 increase. Indeed even De Natale's own testimony did not reflect that the Board of Directors approved the specifics of the increases, i.e. merit and across the board components, but only that it approved an amount not to exceed 4 to 5% of Respondent's budget, and they were to be granted as soon as possible.

Respondent produced no documents memos or other written materials which established how and when the evaluations and merit increases was calculated, or how and when it decided upon the amount of 15 cents per hour across the board increase. The absence of these documents, as well as the absence of Challita's testimony further detracts from Respondent's attempts to meet its burden of proof.

Further, the evidence discloses that nearly half of the evaluations used to determine the merit portion of the increase were not submitted until April and May, indicating that Respondent made a concerted push to expedite the increases after it became aware of the Union campaign. In that regard, while De Natale asserts that officially aware of the Union's appearance when it received the petition on April 24, he admitted that he had been told approximately seven days before that date, that the Union was attempting to organize Its Respondents employees. Thus Respondent's assertion that is notification to employees of the raise on April 23, the day before the petition being filed, demonstrates the lawfulness of its action is without merit.

I find that while Respondent had intended to grant its employees increases, it rushed its approval, upon notification that the Union was organizing. It is significant in this regard, that while De Natale testified that Respondent did not grant the increases as promised in October of 2002, primarily because evaluations had not been submitted by supervisors, it nonetheless granted the increase on May 2, 2003, and announced them on April 23, when it still had not received a number of evaluations from supervisors.

I also note that Respondent in its May 9 memo to employees discussing the Union, made direct reference to the increases granted a week earlier, as demonstrating that it has provided competitive wages to employees. I find that this further indicates that the increases were timed in order to influence the employees' vote in an election.

Finally, I am also not persuaded that Respondent's decision to grant an across the board increase on May of 2003 was even contemplated by or decided upon by Respondent prior to the Union's appearance. De Natale's testimony that Respondent contemplated an across the board increase as of a component of the increase promised in 2002 is not supported by any documentary evidence, and is further undermined by the absence of Challita's testimony. More importantly, Respondent's own letters to employees do not support De Natale's testimony. The January 23, 2002 memo from De Natale although promising a wage increase in October of 2002, mention only a merit adjustment review. While it did refer to correcting inequities in salary, and mentioned that there would be adjustments to make up for inequities in January 2002, it did not state that would be another such adjustment in October of 2002. Thus from that memo, it appears that Respondent had corrected the inequities in salaries, and was promising only a merit increase, based on evaluations, in October 2002. Further, and more significantly, even in the memo of April 23, announcing the wage increases, Respondent stated that it had "corrected existing salary inequities" in January of 2002, and set out to implement merit increases on October 4, 2002. It goes on to announce that the Board had authorized the payment of merit increases, retroactive to October 1, 2002. There is no mention of an across the board increase in that memo. It was not until the employees received their raises on May 2, that Respondent announced in a memo that in addition to merit increases, it was able to provide a base rate increase to stay competitive. I therefore conclude that Respondent has not established that it had intended to grant an across the board increase, prior to the Union's appearance, and that this decision was not made until sometime between April 23 and May 1. [26]

In sum, I conclude that Respondent has failed to adduce sufficiently convincing evidence to rebut the inference of illegality of the wage increases that it granted on May 2, particularly with respect to the timing of the increases. *McAllister, supra; Perdue Farms, supra.* Moreover, I also conclude that as to the across the board increase, Respondent has failed to demonstrate that it intended to grant that wage increase at all until the union appeared on the scene.

Accordingly, I conclude that Respondent has violated Section 8(a)(1) of the Act by granting wage increases to its employees on May 2, 2003.

[26] Further evidence in support of this finding, is Respondent's failure to introduce any documentary evidence of the surveys that De Natale testified had been utilized by Respondent in determining the amount of this increase, allegedly in March. I also note that Respondent did not grant an across the board increase to supervisors, while doing so for unit employees. This further indicates that this increase was granted to influence the results of the election.

E. The Alleged Discrimination Against Mary Lynch

In assessing the legality of Respondent's conduct towards Lynch, it must first be determined whether General Counsel has established that a motivating factor in Respondent's decision was the union or protected activity of Lynch. *Wright Line,* 251 NLRB 1083 (1980). Once General Counsel has met that burden of proof, the burden shifts to Respondent to prove that by a preponderance of the evidence, that it would have taken the same action absent the employees' protected conduct. *Wright Line, supra; National Labor Relations Board v. Transportation Management,* 462 U.S. 393 (1983).

Initially, Respondent argues, correctly, that Lynch was never terminated by Respondent, as alleged in the complaint. However, this is not the end of the inquiry. It is clear and not disputed by Respondent, that Respondent did reduce Lynch's hours by terminating her regular Friday shift in mid June. This action amounts to change in her terms and conditions of employment, and can be unlawful if motivated by her union activity. *Doctors Hospital of Staten Island,* 325 NLRB 730, 736-37 (1998).

In this regard, there is no question that Lynch was one of the primary organizers for the Union, and that Respondent was aware of her activities on behalf of the Union. She signed a card, she distributed cards and flyers at the facility when she worked. On one of the Union flyers, which De Natale admits that he saw, Lynch's picture appeared as one of three Union supporters and one of the members of UNITE's organizing committee.

More importantly, Lynch was the most vocal of employees who spoke up in favor of the Union at the May 28 meeting conducted by De Natale. In this regard, Lynch contradicted or disagreed with De Natale and other managers on several occasions on such issues as the Union's initiation fee, whether employees can be expected to live off $9.00 per hour, or whether a union could make things worse for employees if it came in. Further Lynch used the words "bullshit" referring to statements by De Natale on more than one occasion. Indeed, De Natale conceded that he was aware that Lynch was a supporter of the Union.

Also significant is the timing of Lynch's change of status. She was notified of the decision on June 19, just 2 days after the count of ballots of the mail ballot election which showed that the Union was successful, notwithstanding Respondent's vigorous anti-union campaign, This "astonishing timing", *FPC Holdings d/b/a Fiber Products,* 314 NLRB 1169, 1186 (1997), provides substantial evidence of anti-union motivation, *Trader Horn of New Jersey Inc.,* 316 NLRB 194, 198 (1995); *Equitable Resources Energy Co.,* 307 NLRB 730, 731 (1992). Indeed "Timing alone may suggest anti-union animus as a motivating factor in an employer's action. *Cell Agricultural Mfg. Co.,* 311 NLRB 1226, 1232 (1993); *National Labor relations Board v. Rain Ware Inc.,* 732 F.2d 1349, 1354 (7th Cir. 1984); *Sawyer of Napa,* 300 NLRB 131, 150 (1990).

Further, animus towards the union has been established based upon the 8(a)(1) violations described above, including unlawful interrogations, threat to withdraw benefits, granting an unlawful wage increase and unlawful solicitations of grievances, directed in part towards Lynch.

The above evidence is more than sufficient to meet General Counsel's burden of establishing that a motivating factor in Respondent's decision to reduce Lynch's hours and change her status, was Lynch's protected activities. The burden then shifts to Respondent to establish by a preponderance of the evidence, that it would have taken the same action against Lynch, absent her union activities.

I find that it has fallen short of its burden in this regard. Respondent's defense, based primarily on the testimony of Lynch and supported in part by the testimony of Ogundiran, is that Lynch's regular position on Fridays was always considered "temporary", and that it was to expire when the "transition" involving Lynch's relation with A. F. had been completed.

However, while Respondent claims that her position was always considered "temporary", I have found above that Respondent never communicated that fact to Lynch. Further, Respondent has adduced no documentation to this effect either in August of 2002, when the position was created for her, or in June of 2003 when it was eliminated.

I note that the lack of any evidence that the ending of this alleged "transitional period", became of any concern of Respondent until June of 2003. While Nelson testified that Respondent created an extra position for Lynch, beyond the normal staffing pattern, on Fridays, she was clearly prepared to tolerate the alleged extra position until the union election victory. Based on her own testimony, she made no inquiries as to how the "transition" was progressing until December of 2002, when she allegedly asked Campos, who allegedly told her, that A. F. is "Not ready yet". She added that she asked Campos again one more time between December and May about the "transition", and was allegedly told he hadn't heard of any problems, but would check with the psychologist and the staff to see how things were going. Finally, Nelson claims that sometime in late May or early June, she again asked Campos how A. F. was doing, and was allegedly told that the psychologist and assistant manager felt comfortable that the extra day was no longer necessary. She further asserts that she informed Campos to stop the shift now and to inform Lynch.

Ogundiran's testimony provides some support for Lynch's testimony by claiming that sometime in May or June he noticed A. F. was adjusting well, and so informed Saunders at that time that if Lynch is out of A. F.'s life, there would be no negative impact. However, Ogundiran was vague and uncertain as to who brought up the subject, and admits that he had no discussion with Saunders about changing Lynch's schedule or her shift.

I find this testimony of Nelson and Ogundiran to be unconvincing since it is not corroborated by any documentation, nor by any evidence of any particular event or incident that led Respondent to the conclusion that Lynch's services were no longer needed on Fridays.

Nelson's testimony that she notified Campos in late May or early June to stop Lynch's shift at that time and so notify Lynch at that time is suspect, since the notification to Lynch was not made until June 19, two days after the election. No explanation was offered by Lynch or any other witness from Respondent as to why there was a delay in implementing this decision by Nelson.

In this regard I find the absence of testimony by Campos and Saunders, the two supervisors most directly involved in supervising Lynch, and who allegedly notified Ogundiran and Nelson that Lynch was no longer needed, and who could perhaps explain why there was a delay between Nelson's decision and the notification to Lynch, is particular damaging to Respondent's ability to meet its burden of proof. In fact, I deem it appropriate to draw an adverse inference from the failure of Respondent to call these witnesses, and conclude that their testimony would be unfavorable to Respondent on the above or other issues relative to Lynch's loss of hours and change of status. *International Automated Machine, supra; United Parcel Service of Ohio,* 300 NLRB 300 fn. 1 (1996); *Ready Mix Concrete,* 317 NLRB 1140, 1143 fn 16 (1995).

Thus, the record is completely silent as to what event or incident allegedly occurred on or about June 19, that led Respondent to decide to either look into whether the alleged "transition" had been completed or that in fact it was no longer necessary for Lynch to be in A. F.'s life. The only event the record discloses had occurred was the election results. In this regard, Respondent points to Lynch's own testimony, which admits that as of June 19, she was no longer the primary caretaker for Lynch. However, this admission is not significant, since the record does not establish precisely when Lynch was no longer deemed the "primary" caregiver to A. F. It seems likely, that since for over 10 months, Lynch was interacting with A. F. only once a week, that her status as "primary", had changed long before June 19, and that other staff members or member who had watched A. F. for the other days or shifts would have been designated as A. F.'s "primary."

Another fact detracting from the viability of Respondent's defense is the fact that when it notified Lynch of the decision to eliminate her regular shift, Lynch was told by Saunders through employee Bramwell, that Respondent had hired another employee to replace Lynch, who could work Fridays, Saturdays and Sundays. This statement was admittedly incorrect, since even Nelson asserts that no new employee was hired. I find that Respondent providing Lynch with a clearly false reason for the loss of her shift, is but another defect in their defense. [27] Respondent also asserts that Lynch conceded that at one point, she could not work any more Fridays, because her schedule had changed. However, this fact has no bearing on the lawfulness of Respondent's conduct or the ability of Respondent to meet its *Wright Line* burden of proof. When Respondent made its decision on June 19, to eliminate Lynch's regular Friday shift and thereby reduce her hours, she was still available for Friday work and still able to work on that day. Whatever happened thereafter concerning her availability, is relevant to issues of back pay, and will be considered at the compliance stage of this case. However, they are not relevant to the question of whether Respondent acted lawfully on June 19.

Accordingly, based on the foregoing analysis and authorities, I conclude that Respondent has failed to meet its burden of proving that it would have reduced Lynch's hours and eliminated her Friday shift on June 19, absent her activities on behalf of the Union. It has therefore violated Section 8(a)(1) and (3) of the Act. I so find.

F. The Termination of Trecia Usher

Before assessing whether General Counsel has met its initial burden of proof under *Wright Line*, it is essential to make some credibility resolutions vis à vis the testimony of Paul Campbell, as well as Clark and Usher.

Campbell testified as noted that he attended several management meetings, wherein De Natale asked supervisors to identify which employees at various residences were union supporters, and that at these meetings a census was taken of how each employee intended to vote. He further testified that he informed management about ringleaders in his house, including Usher. Finally he asserts that De Natale instructed supervisors to create a paper train for pro-union employees so that Respondent could terminate them, if Respondent could not convince them to vote "No."

All of this testimony was adamantly denied by De Natale, supported by Nelson, as well as Gallishaw for the most part. Gallishaw admitted that De Natale asked managers about the

[27] Once again it is notable that Saunders did not testify to explain why she provided this false explanation to Lynch.

Union sentiments of their employees at their particular residences, and that managers did reply to De Natale by giving numbers of employees for or against the Union. De Natale himself admits asking generally about how things were going vis à vis the election, and that supervisors would respond that there was support for the Union at their houses, or that they have no idea. Further De Natale admits that Campbell replied to his inquiry, that there were a lot of people at his house in favor of the Union.

I credit the testimony of Respondent's witnesses, De Natale, Nelson and Gallishaw, and do not credit Campbell's testimony as outlined above. I found Campbell to be an argumentative and unconvincing witness, who seemed to have a grudge against Respondent for discharging him for campaigning for the Union. [28] I felt that he was attempted to exaggerate his testimony in order to make Respondent look bad, rather than attempting to truthfully recollect what had transpired. Moreover his testimony was filled with inconsistencies and unbelievable accounts. For example at one point in his testimony, he testified that he told management that the ringleaders of the Union were Campbell, Clark, Usher and Frances Pierre. Later on in his testimony, he changed and asserted that he told Respondent that the ringleaders were Clark and Elvis Scott. Further there is no evidence as to when he allegedly determined who the "ringleaders" were, and no evidence that any of these individuals were in fact ringleaders. Campbell's testimony about the alleged census taken by Respondent of employees' sentiments makes little sense and was not consistent. At one point, he claimed that managers were instructed by De Natale to formulate a list of all employees who were either for or against the Union. Then at another point in his testimony, he claims that before the first meeting, each and every supervisor had already found out which employees were for or against the Union, because there was a secretive rumor that the Union was going to come in. According to Campbell, at this first meeting, each and every supervisor had a definitive YES or NO response for each employee, resulting in a tally of 24, YES and 13, NO. I find that testimony to be incredulous. It is simply not conceivable that each and every employee would have expressed their union sentiments to supervisors and find it highly unlikely that each supervisor would have asked each employee their views on the union, simply because there was a rumor in going around that the union was going to come in. Furthermore, there are approximately 150 employees in the unit, so Campbell's testimony that a vote of 24-13, (or even 36-24 that Campbell mentioned as the tally at another meeting), cannot possibly be accurate where every employee was counted, as Campbell insisted.

I also find it highly unlikely, that even after inquiries by supervisors, that each and every employee would express their union sentiments to supervisors. I find it more probable, as in fact was the case when supervisor Burchett asked employees about contacts with the Union, that no response was forthcoming.

In this regard, Charging Party argues that the testimony of Martis about Burchett's questioning is supportive of Campbell's testimony, since Burchett informed the employees that he wanted to know if they had been contacted by the Union, because he was going to attend a manager's meeting at the main office. I do not agree. Rather, I believe that this testimony instead supports the testimony of De Natale and Gallishaw about Respondent's management meetings, which I credit, as described above. Thus, Burchett's statement to the employees does not necessarily indicate that he intended to report back to management the names of any employees who were contacted by the Union. I find that comment to be consistent with the credited testimony of De Natale and Gallishaw, that De Natale did ask the supervisors about

[28] I note that the discharge of Campbell has not been alleged as being unlawful under the Act.

their knowledge of union support at their particular houses, and that some manager's replied that they had no idea, and that some including Campbell replied that there was union support or a lot of union support at their particular houses. I find this to be a more probable and likely outcome of such inquiries, and I therefore conclude that this is what happened at these management meetings. I therefore do not credit the testimony of Campbell that he told management the names of any union supporters or alleged "ringleaders," and that he did not tell them that Usher was a ringleader for or supporter of the Union. I do find as noted, and as De Natale admitted, that Campbell told management that there was a lot of support for the Union at his house. [29]

Further, I also do not credit the testimony of Clark and Usher that Campbell told them that he informed management that Usher and Clark and other employees were "leaders" or "union reps" for the Union. [30] I note that there is simply no record evidence that either Usher or Clark were "leaders" for the Union. In fact, there is no evidence that either Clark or Usher engaged in any activities on behalf of the Union, other then to answer Campbell's inquiries about how they were going to vote by telling Campbell that they intended to vote for the Union. I do find however, consistent with the testimony of Clark and Usher, that Campbell did tell them that he informed management that everyone on his staff or in his house was going to vote for the Union. That remark is consistent with De Natale's testimony, as detailed above that Campbell informed him that there was a lot of support for the union at his residence.

These credibility findings result in a conclusion that General Counsel has failed to establish that protected conduct was a motivating factor in Respondent's decision to discharge Usher. It is essential that General Counsel establish that Respondent's officials that terminated Usher had knowledge of her activities or support for the union. Absent such a finding, a *prima facie* showing of discrimination has not been demonstrated. *Music Express East,* 340 NLRB No. 129 Slip op. 1-3 (2003) *Central Plumbing Specialties, Inc.,* 337 NLRB No., 153 (2002).

The only evidence of Usher's union activities presented was her responding to Campbell's questions and admitting that she intended to vote for the Union. However, I have found above that Campbell did not inform management that Usher was a ringleader for the Union. I also conclude that since Campbell was a vigorous supporter of the Union, that is unlikely that he notified any higher management officials that Usher, or anyone else for that matter, were union supporters or that they intended to vote for the Union. In such circumstances, it is not appropriate to infer knowledge of Usher's union activities on the part of Respondent, even though Campbell is a supervisor and he was aware that Usher intended to vote for the Union. *Music Express, supra; Efficient Medical Transport,* 324 NLRB 553 fn. 1 (1997); *Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82 (1980).

---

[29] Another reason why I do not credit Campbell is his testimony about the alleged instructions by De Natale to create a paper trail for pro-union employees so that they could be terminated if Respondent could not convince them to vote "NO." In this regard Campbell testified that he wrote up several employees for termination, but these recommendations were not followed. I find this testimony not believable. First of all the alleged recommendations for termination written by Campbell were not produced. Further, it makes little sense for Respondent to instruct supervisors to prepare such recommendations to terminate union supporters and then not act on it. I find this testimony an example of Campbell simply attempting to make Respondent look unfair to its employees.

[30] I note that the flyer sent out by the Union listing names of 47 employees as members of the organizing committee, did not include either Clark or Usher.

While I have concluded above that Campbell did inform higher management that there was a lot of support in his house for the Union, I find this insufficient evidence to establish knowledge by Respondent that Usher was one of those union supporters. [31]

In addition to the lack of knowledge of Usher's union activities, which is enough in and of itself to find that General Counsel has not met its *Wright Line* burden of proof, I also note that the timing of Ushers discharge does not support a finding that anti-union animus was a motivating factor in her discharge. Even if one construes Respondent's knowledge of union support at Usher's residence to be sufficient evidence of knowledge of Usher's union support, the discharge was remote in time from her union activity and the election, since she was terminated nearly two months after the election, and was proximate in time to the event for which she was purportedly terminated. *Snap-on-Tools, Inc.,* 342 NLRB No., 2 Slip op. p. 5 (2004); *Music Express, supra* at 2. Furthermore, the record discloses that Usher was accused of abuse in July, and at that time after an investigation showed that abuse was not confirmed, she was reinstated to her position. General Counsel emphasizes this prior incident, and notes that unlike in the August incident, Usher was paid during the period of her suspension while the investigation was being conducted, and was allowed to perform clerical duties in the office during this period. General Counsel seems to be arguing that this evidence somehow constitutes disparate treatment and demonstrates discriminatory conduct. I cannot agree. While Respondent has provided no explanation as to why it treated Usher differently in August than it did in July, vis à vis her suspension, there is no basis to conclude that this difference is related to any protected activities of Usher. [32] To the contrary, her July suspension was closer in time to the election, (about a month), than was her August suspension and discharge. Therefore, if Respondent intended to discriminate against her for her union activities, it had a perfect opportunity to do so in July, less than a month after the election. However, Respondent did not terminate her in July, although there was an accusation of abuse made against her at that time. Respondent acted essentially the same way in each incident. It conducted an investigation as per OMRDD rules, and made its decision on discipline based on the results of the investigation. Therefore, I find that Respondent's conduct towards Usher in July substantially diminishes any possible inference of discriminatory conduct for the August termination, which was as noted more remote in time from the election.

Although I have found above that Respondent did demonstrate union animus in several respects, I note that none of these violations were directed at Usher, *Music Express, supra,* and in view of my findings above with respect to knowledge and timing, are far from sufficient to establish the necessary link between Usher's discharge and her protected conduct.

Both General Counsel and Charging Party rely heavily on Respondent's failure to call Campos, who conducted the investigation relied on by Respondent, where it terminated Usher, and argue that on adverse inference is appropriate. *International Automated Machine, supra.; Greg Construction Co.,* 277 NLRB 1411 (1985). While I agree that an adverse inference is appropriate, and find the failure to call Campos somewhat troubling, I am not persuaded that such an inference is sufficient to overcome General Counsel's failure to establish the crucial elements of knowledge and timing as detailed above. Moreover, I note that while Campos did not testify, Respondent did offer into evidence the investigative report prepared by Campos as a business record. I received the report into evidence as a business record, and I adhere to that

[31] There were 10 employees at the residence.

[32] I note that Barker conceded that Usher should have been paid for the period of her suspension in August, as per normal practice, and as stated on her suspension notice. This suggests that the failure to pay her in August may have been merely a clerical error.

ruling. Investigative reports are admissible as business records where they are maintained in the regular course of business, are sufficiently reliable and trustworthy, and free from bias. Here there report is kept in the regular course of business, and is in fact required by OMRDD. There is no basis to question the reliability of the report, and there is no evidence of bias. [33] Therefore the report is admissible. *Trumbull Memorial Hospital,* 288 NLRB 1427, 1444 (1988); *Malek v. Federal Insurance Co.,* 994 F 2d 49 (2nd Cir. 1993); *United States v. Ray,* 930 F. 2. 1368, 1370 (9th Cir. 1990); *McMellon v. Safeway Stores Inc.,* 945 F. Supp 1402 (D. ORC 1996); *Shea v. Fairman,* 1991 WL 160332, 3 (N. D. I ii 1991).

Moreover, even apart from the business records exception, the report, although hearsay can be admitted, if it is rationally probative and corroborated. *Dauman Pallet Inc.,* 314 NLRB 185, 186 (1994). Here there is substantial corroboration of Campos' report, from the testimony of Martin, as well as even the testimony of Usher, since the report accurately set forth Usher's version of events, as she testified at this hearing. It is also somewhat troubling that Respondent failed to call any witnesses who made the actual decision to terminate Usher. It appears from the record that the decision makers were Brodsky and or Walden, and neither of these individuals was called as a witness. [34] However, notwithstanding this omission, and any possible adverse inference from the failure to call these witnesses, I do not find the evidence sufficient to establish discriminatory conduct by Respondent. The fact is that the record is clear that Respondent made its decision based upon the report filed by Campos, which found the accusation of abuse to be "Substantiated." This report is in evidence, and contrary to General Counsel, I do not find that Respondent conducted a "shoddy" investigation.

General Counsel and Charging Party both rely on the fact E.G., the only eyewitness to the abuse is suffering from paranoid schizophrenia, and that E.G. had previously made accusations that she had been sprayed in her eyes in the shower. Further they note that E.G. told Martin that she was sprayed again by Usher, after Usher was terminated. However, none of this evidence requires a finding that the investigation was "shoddy" or that it was used as a pretext by Respondent. While E.G. does suffer from paranoid schizophrenia, Respondent's witnesses credibly testified that this fact does not necessarily establish that the individual is not telling the truth. The prior instances of E.G. complaining about being sprayed in the shower is not significant. There is no evidence that Respondent became aware of these complaints, or that these complaints were not valid. As for the complaint to Martin after Usher's discharge, there is no evidence that Respondent ever became aware of that complaint, since Martin did not report it.

More importantly, E. G. wasn't the only witness to the alleged abuse. Martin although she did not observe the alleged spraying, was a crucial supporting witness. She observed E.G. screaming and accusing Usher of spraying her, and observed Usher standing with a can of spray in her hand. Significantly, Usher did not deny that she sprayed E.G., and did not say anything at all. These circumstances are clearly supportive of E.G.'s assertion, and provided a reasonable basis for Respondent to conclude that Usher engaged in abuse. I need not and do not find that Usher committed abuse, but I do conclude that Respondent had a reasonable basis for believing that she did, and that it acted on that belief in terminating her. *G H R Energy Co.,* 294 NLRB 1011, 1014.

---

[33] Cf. *Allied Lettercraft,* 280 NLRB 979 (1986) (Report not allowed because it was prepared for purposes of litigation.)

[34] I do note that Walden is no longer employed by Respondent.

Accordingly, I conclude that General Counsel has not established that protected conduct of Usher was a motivating factor in her termination. Moreover, even if I had found that General Counsel had met its burden of proof in this regard, I would find that Respondent has met its burden of proving that it would have discharged Usher, absent her union activity. Thus, several of Respondent's witnesses credibly testified that except in rare circumstances, when allegations of abuse are substantiated, discharge follows. Indeed, even Campbell, who as noted was called as a witness for General Counsel, testified that "Nine out of ten times, if you abuse one of the clients, you're going to be terminated."

Further, several specific instances of employees and or supervisors, who were terminated for abuse were detailed by Respondent's witnesses. They include instances where an employee was terminated for striking a consumer even though the consumer had struck the employee first, a supervisor was terminated for "lifting up" a consumer to force the consumer to shower, and an employee who stepped on the feet of a consumer to keep the consumer from jumping up and down. The examples of abuse where discharge resulted, even where the abuse was provoked, constitute significant evidence the Respondent would have terminated Usher, absent any union activity on her part. I so find.

Therefore, I recommend dismissal of this allegation of the complaint.

G. The Alleged Discrimination Against Gulley and Young-Reddick

Before analyzing the issues of whether General Counsel has established that any actions taken by Respondent against Young-Reddick or Gulley were motivated by their union activities, it is essential to make some credibility resolutions vis à vis the testimony of Gulley and Young-Reddick and the testimony of Respondent's witnesses particularly Gallishaw. There are some significant differences in the testimony concerning the alleged overhearing by Gallishaw of Young-Reddick and Gulley discussing the Union, as well as some differences concerning what was discussed between the employees and management officials concerning their discharges and the incident that allegedly precipitated Respondent's decision. Overall I found the testimony of Young-Reddick and Gulley to be unreliable and untrustworthy. Their testimony was frequently internally inconsistent, shifting, and often inconsistent with each other, and in Young-Reddick's case inconsistent with her affidavit. I therefore do not credit their testimony, except where it is consistent with the testimony of Respondent's witnesses.

As described above, I have already discredited their testimony that Gallishaw informed them that they could no longer eat with consumers, which testimony I believe was merely an attempt to bolster their testimony about the alleged necessity to leave the residence to get something to eat. Their testimony was inconsistent with each other as to whether they left the residence together, and their testimony concerning when they left and when they returned was also shifting, and inconsistent with credited testimony of Gallishaw that he returned to the residence at 6:00 P.M., and neither of the employees were there. In this regard for example, Gulley at one point told Gallishaw that she left at 6:30 P.M., and at another point that she returned at 6:30 P.M. In fact, neither time is accurate since Gallishaw was at the residence at 6:00 P.M., and the employees had left and had not returned. I find therefore consistent with Gallishaw's testimony that the employees left shortly after 5:30 P.M. and did not return until 7:50 P.M.

Further, their testimony about not being aware of the need to obtain permission to leave the facility is not credible. All management officials, as well as several other of General Counsel's witnesses state that they were aware that permission was required from supervisors before an employee can leave the premises or leave their consumers with someone else.

Further, Respondent's own handbook, which both employees admitted having read, makes it clear that such permission is required. Further when Young-Reddick spoke to Nelson about the incident on the phone, Nelson asked if she had gotten permission to leave. Reddick-Young admitted that she had not, and admitted further that she was aware that she needed to obtain permission from a manager or coordinator to leave the residence. Her only response was, "Yes, but I was hungry." [35] Further Young-Reddick admits that when confronted with the accusation of not receiving permission from Gallishaw, she stated that she did not have Gallishaw's page number. That testimony is not helpful to her credibility. This even if she did not have Gallishaw's page number, she could have tried to reach him at the main office, or tried to reach other management Officials. Indeed she clearly knew how to reach Nelson, which she did immediately upon being notified by Gallishaw to punch out, in order to question whether Gallishaw had the authority to order her to do that.

Finally, the testimony of the employees concerning the prior experiences with leaving the residence without permission was also inconsistent, shifting and not credible. Young-Reddick initially testified that she left on numerous occasions for lunch without asking permission from managers. However, her affidavit states that June 24 was the first time that she had even left the site to go on a lunch break without asking for permission. She added that she had seen Gulley frequently leaving the residence without permission, and Gulley would ask Young-Reddick to watch her consumers. Gulley, on the other hand, after initially testifying that she in the past left without receiving permission, conceded that June 24 was the first time that she had left to get something to eat after Gallishaw became a supervisor, and that when the prior supervisor (Aquilla) was present, she would leave to go out, but would tell Aquilla about it and would be told that it was O.K. to leave. [36] Thus based on the above and other factors, I do not credit the testimony of Young-Reddick and Gulley, where it conflicts that of Respondent's witnesses.

Therefore, I do not credit their testimony concerning their conversation allegedly overheard by Gallishaw in late May, that they intended to vote for the Union, and I credit Gallishaw's denial that he ever overheard their discussing the Union, or that he was aware of whether or not either of them supported the Union or intended to vote for the Union. In addition to my reasons detailed above for discrediting Gulley and Young-Reddick in general, I note also an important inconsistency between the testimony of Young-Reddick and Gulley concerning the incident in question. Both employees testify that they discussed their intentions to vote for the Union in Gallishaw's office with Gallishaw sitting at his desk 4-5 feet way from them. However, only Young-Reddick testified that Gallishaw turned around in his chair and said "You all don't need a Union. Look at me, I don't need a Union." Gulley did not testify to hearing Gallishaw make this remark, which is crucial in establishing that Gallishaw overheard the employees' discussions about voting for the union. The absence of corroboration from Gulley of Young-Reddick on this portion of her testimony is further reason to discredit the employees and credit Gallishaw that he did not overhear any such discussions and was unaware of the union support of either employee.

Having made that finding, the evidence discloses a substantial defect in General Counsel's assertions that the actions taken against Gulley and Young-Reddick was discriminatorily motivated, since absent the crediting of this testimony there is no evidence that Respondent was aware of the employees' support of or activities on behalf of the Union. Thus while both employees testified that they distributed authorization cards and or union flyers to

---

[35] I note that Young-Reddick did not deny this conversation with Nelson.

[36] Indeed, Aquilla would at times agree to watch her consumers.

other employees at various residences, including their own, there is absolutely no evidence that any supervisors or management representatives observed the conduct or became aware of this activity. Further, while Young-Reddick at the May 28 meeting conducted by De Natale, asked for a definition of "at will" employee when that subject was raised, that inquiry does not indicate support for the union, or otherwise indicate that Respondent would be likely to be angered by the question.

I therefore conclude that General Counsel has not established that Respondent was aware of any union activities or support of either Young-Reddick, or Gulley, and that defect in its case is sufficient to conclude that it has failed to make a prima facie showing of discrimination. *Music Express, supra.*

While the timing of the discharges is somewhat suspicious, since they occurred within a week of the election, the employees were terminated immediately after they left the facility without receiving permission, which was the primary reason given for the discharge. Further, as explained below I do not find that this reason was pretextual. Thus the timing is insufficient to establish the missing essential element of knowledge, *Central Plumbing Specialties, supra at 975; Music Express , supra.*

As for the animus that I found above, as in the case of Usher, none of the 8(a)(1) statements disclosed above were directed towards either Young-Reddick or Gulley. *Music Express, supra.*

With respect to the issue of pretext, General Counsel and Charging Party make several arguments in support of their position, that I should so conclude. They rely with respect to the discharges, on the alleged ambiguity in Respondent's handbook with respect to leaving without permission, as well as the indication therein that progressive discipline should be followed in such cases. Further they assert that Respondent gave shifting reasons for the terminations, including inconsistent explanations as to why it was improper for the employees to have brought their consumers up to Metro I and left them with the consumers of Metro II.

With respect to the handbook, I do agree that the handbook is somewhat ambiguous, since it has several statements in different parts of the book relating to the issue of receiving permission, and it also defines working time as not including meal periods or break. However, the manual does unequivocally state that employees are not permitted to leave during working hours, and unexcused leave is cause for dismissal. Another section defines leaving an assigned work site without authorization as a neglect of duty, without reference to working hours. While the latter section mentions progressive discipline, other sections that discuss discipline do not, including another section that allows Respondent to discipline without using progressive discipline for serious misconduct, which can be "any other reason deemed sufficient in IRI's sole discretion."

Thus the handbook, although admittedly ambiguous, does provide wide latitude to Respondent, and it cannot be concluded that the ambiguity is sufficient to warrant a conclusion that the decision was pretextual. In that regard, I note that apart from the manual, testimony of all management witnesses, plus several of General Counsel's witnesses, including Campbell, all establish conclusively that employees were required to obtain permission from a supervisor before they left their residences, and or when they leave their consumers with other employees. In such circumstances, a finding of pretext cannot be found. As to the allegations of shifting reasons, it is true that one of the reasons given by several of Respondent's witnesses including Gallishaw for the termination, was the fact that the consumers were taken upstairs to Metro II, a different residence, and left with employees of Metro I. In this regard, there is credible evidence

in the record, that his was a common occurrence, and the reasoning given by Respondent's witnesses for asserting that this conduct was improper was not always consistent. Thus the reasons given included that Metro I was too small to accommodate all the consumers, it was a hot day, and it was a problem to mix consumers with target behaviors. However, Respondent's witnesses do present plausible reasons for objecting to the consumers being placed together, particularly without permission from supervisors. Metro I and Metro II are separate residences, are separately certified, and they have differing staffing requirements. Therefore it is not unreasonable to conclude that Respondent would want supervisors to be aware of the employees mixing consumers and leaving Metro I consumers with Metro II employees. Further, it is clear from the evidence, particularly the termination notice submitted by Respondent that the employees' conduct of leaving without permission was the primary reason for the termination. [37]

I would note that I may consider it a harsh and unfair decision by Respondent to discharge two employees, primarily for failing to obtain permission to leave the premises, without a warning, and with a hand book that is somewhat ambiguous, particularly as to when progressive discipline is to be used. However, that it is not the test for finding a violation of law or establishing pretext. It is not for me to judge that the discipline is too harsh or unfair, but only to decide whether in fact Respondent relied on the asserted grounds for discharge, rather than to retaliate against them for these employees' union activities. The Board will not substitute its own judgment for the employer's as to what discipline would be appropriate. *Fresno Bee,* 337 NLRB 1161, 1162 (2003).

Accordingly, based on the foregoing analysis, I cannot conclude that the termination of these employees was pretextual, and find that General Counsel has failed to make its requisite initial showing that anti-union activities of the employees was a motivating factor in Respondent's decision to discharge them. *Ronin Shipbuilding Inc.,* 330 NLRB 464, 465 (2000). Moreover, even assuming that General Counsel made such a showing, I find that Respondent has met its rebuttal burden of showing that it would have discharged Young-Reddick and Gulley in the absence of Union activity. Respondent has shown that the failure to obtain permission to leave the residence is not permitted, and also demonstrated that it terminated two other employees in virtually identical circumstances, for the same conduct of leaving without permission, before any union activity had taken place. *Ronin Shipbuilding, supra.*

Therefore, I recommend dismissal of the complaint allegation that Young-Reddick and Gulley were discharged unlawfully.

The allegations in the complaint with respect to the alleged imposition of more onerous work assignments and the elimination of a job benefit, must also be dismissed as well. As with the case of the discharge allegation, the absence of evidence of Respondent's knowledge of

---

[37] Thus conclusion is not refuted by Gallishaw's testimony that he might not have recommended discharge, had the employees not lied to him or acted differently when he confronted them on June 24. (i.e., Young-Reddick stating that this was "bullshit"). That admission by Gallishaw does not detract from his testimony, supported by other management officials that the primary reason for the discharges was the employees failure to receive permission to leave the premises. While if the employees had not lied to Gallishaw about the time that they were away, or if they had been apologetic when being confronted, perhaps Gallishaw may not have recommended termination, but these events did not happen, so that admission of Gallishaw is mere speculation, and does not establish that his actions were pretextual.

Union activities, precludes any finding of discrimination against the employees. Moreover, the substantive allegations themselves have no merit, even apart form this substantial defect in General Counsel's case.

The alleged imposition of more onerous work assignments, refers to Gallishaw asking the employees to help him out and update the "Res Hab" books. The evidence is clear that Gallishaw did not assign the work to the employees, but merely asked them to do him a favor and help him out, due to the fact that an audit was imminent. Thus the fact that this work is normally performed by management is not relevant, since Gallishaw merely asked the employees to "Do him a favor," and help him out, and did not order them to perform this work which took slightly over 35 minutes. In any event, I find simply no evidence in the record to support an inference that this "request" of Gallishaw to help him out and do this work, even if it is construed as an implied order, was motivated by any protected activity of Young-Reddick or Gulley. I shall therefore recommend dismissal of this allegation of the complaint.

As to the allegation of a loss of benefit, by Gallishaw allegedly informing Gulley and Young-Reddick that they could no longer eat with consumers, I have found above, contrary to the testimony of Young-Reddick and Gulley that Gallishaw never gave such an instruction to the employees. Rather, as I concluded above, he informed all employees, that they must sign their names when they remove food from the refrigerator. That action was taken due to the problem of food being stolen, and was taken pursuant to suggestions from employees, including Young-Reddick herself the fact that Young-Reddick or Gulley may have construed this requirement, as they testified as an order not to eat with consumers is not pertinent. It is clear that Gallishaw's requiring employees to sign out when they remove food from the refrigerator, does not forbid employees from eating with consumers, a practice encouraged by Respondent. Furthermore, there is simply no evidence that this action by Gallishaw was motivated by anything other than his desire to stop the stealing of food, or that union activities of any employees played any role in this decision.

Accordingly, I recommend dismissal of this complaint allegation as well.

Conclusions of Law

1. Respondent, Independent Residences Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Union of Needletrades Industrial and Textile Employees (UNITE) is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating employees concerning their activities on behalf of the Union, soliciting grievances with an implied promise of benefit, threatening to withdraw its program of focus groups if the employees selected their union as their collective bargaining representative, and by granting and timing wage increases in order to influence employees regarding their support for the Union, Respondent has violated Section 8(a)(1) if the Act.

4. By eliminating the regular part time position, of and reducing the hours of Mary Lynch, because of her activities on behalf and support for the Union, Respondent has violated Section 8(a)(1) and (3) of the Act.

5. Respondent has not violated the Act in any other manner alleged in the complaint.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce

within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has violated Section 8(a) (1) and (3) of the Act, I shall Order that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes and policies of the Act.

I shall recommend that Respondent offer Mary Lynch reinstatement to her previous position as regular part-time employee on Friday's. I note that although the record discloses that at the some point, Lynch was no longer available, due to another job, to work that day, that situation may have changed. Lynch is entitled to the return of the status quo, and should be given the option of deciding if she wishes to work on Friday nights for Respondent, as she had prior to the discrimination against her. I shall also recommend that she be made whole for the discrimination against her by the payment of backpay, [38] plus interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [39]

ORDER

The Respondent, Independent Residence Inc., Queens, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees concerning their activities on behalf of or support for Union of Needletrades Industrial and Textile Employees (UNITE) AFL-CIO. (The Union)

(b) Soliciting grievances from Employees and implying that such grievances will be adjusted in order to discourage employees from supporting the union.

(c) Threatening to eliminate its program of focus groups or the withdrawal of other benefits of employees, if said employees select the Union as its representative for collective bargaining.

(d) Granting or timing wage increases in order to influence employees support for the Union.

(e) Eliminating the regular part time position of and reducing the hours of its employees, or otherwise discriminate against employees, because of their support for or activities on behalf of the Union.

(f) In any like or related manner interfering with restraining or coercing employees in the

---

[38] As noted her unavailability to work on Friday nights will of course be relevant to the amount of back pay due her and will be considered in the compliance stage of this case.

[39] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Mary Lynch full and immediate reinstatement to her former job or, if the job no longer exists, to a substantially equivalent position, make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of this decision.

(b) Preserve and, within 14 days of a request make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facilities located in Brooklyn and Queens in New York, copies of the attached Notice marked "Appendix."[40] Copies of the Notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at any time since May 2, 2003.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated

_____
Steven Fish
Administrative Law Judge

[40] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT coerce or interrogate our employees concerning their activities on behalf of or support for Union of Needletrades Industrial and Textile Employees, (UNITE) AFL-CIO, (The Union).

WE WILL NOT solicit grievances from employees and imply that such grievances will be adjusted in order to discourage employees from supporting the Union.

WE WILL NOT threaten to eliminate our program of focus groups or the withdrawal of other benefits of employees, if said employees select the Union as its representative for collective bargaining.

WE WILL NOT grant or time wage increases in order to influence our employees' support for the Union.

WE WILL NOT eliminate the regular part time position of or reduce the hours of our employees, or otherwise discriminate against our employees because of their support for or activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with restrain or coerce our employees in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL within 14 days from the date of this Board's Order, offer Mary Lynch full and immediate reinstatement to her former job or, if that job no longer exists, to substantially equivalent position, make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, plus interest.

INDEPENDENCE RESIDENCES, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

One MetroTech Center (North), Jay Street and Myrtle Avenue, 10th Floor, Brooklyn, NY 11201-4201

(718) 330-7713, Hours: 9 a.m. to 5:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, (718) 330-2862.